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CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT

Initial reports of States parties due in 1993

Addendum

SWITZERLAND [24 February 1995]

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Introduction

The Federal Council has the honour to submit to the Human Rights Committee of the United Nations the initial report of Switzerland, prepared under article 40 of the International Covenant on Civil and Political Rights. This report should be read in conjunction with the core document constituting the first part of the report of Switzerland (HRI/CORE/1/Add.29) and the accompanying annexes. It takes account, in principle, of the status of legislation as at 31 July 1994.

This report describes, article by article, the legislative, administrative, judicial or other measures in force in Switzerland with reference to the rights guaranteed by the Covenant. It attempts to go beyond a mere description of the legal regime and legislation in an effort to depict the true situation of the protection of civil and political rights.

Owing to the federal structure of the State, which attributes large areas of competence to the sovereignty of the 26 cantons and demi-cantons of the Swiss Confederation, some information has been summarized in this report in the form of general rules applicable throughout Switzerland. This is the case, in particular, of procedural guarantees or implementation of penalties, areas in which it would hardly be feasible to give a detailed description of all 26 cantonal legal systems, on top of the federal rules. When it was thought necessary, references to relevant cantonal laws have been included in this report.

The Federal Council trusts that this initial report will be of assistance to the Human Rights Committee and that its examination will provide an opportunity for a fruitful dialogue.

This report was adopted by the Federal Council on 15 February 1995.

List of the main abbreviations used

Legal texts

PPF:	Federal Act concerning Penal Procedure (*Loi fédérale sur la procédure pénale*), of 15 June 1924
OJF:	Federal Judicial Organization Act (*Loi fédérale d'organisation judiciaire*)
CPP:	(Cantonal) Code of Penal Procedure

Compilations of case-law and publications

ATF:	*Recueil officiel des arrêts du Tribunal fédéral suisse* (Official compendium of Swiss Federal Tribunal decisions)
DR:	*Recueil des décisions et rapports de la Commission européenne des droits de l'homme* (Decisions and reports of the European Commission of Human Rights)
ZBl.:	*Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht*
JdT:	*Journal des Tribunaux*
RSDIE:	*Revue suisse de droit international et de droit européen* (formerly ASDI)
RDS:	*Revue de droit suisse*

List of annexes*

Legal texts

1. Constitution fédérale de la Confédération suisse (Federal Constitution of the Swiss Confederation), dated 29 May 1874 (RS (Systematic Compendium) 101).

2. Code pénal suisse (Swiss Penal Code), dated 21 December 1937 (RS 311).

3. Code pénal militaire (Military Penal Code), dated 13 June 1927 (RS 321).

4. Code civil suisse (Swiss Civil Code), dated 10 December 1907 (RS 210).

5. Code des obligations (Code of Obligations), dated 30 March 1911 (RS 220).

6. Loi fédérale sur le statut des fonctionnaires (Federal law containing the Regulations on Public Officials), dated 30 June 1927 (RS 172.221.1).

7. Loi fédérale sur la responsabilité de la Confédération, des membres de ses autorités et de ses fonctionnaires (Federal Law on the Responsibility of the Confederation, the Members of its Authorities and its Officials), dated 14 March 1958 (RS 170.32).

8. Recueil des lois fédérales de procédure (Compilation of federal procedural laws) (containing, in particular, the Act concerning Federal Penal Procedure of 15 June 1934 and the Federal Judicial Organization Act of 16 December 1943).

9. Loi fédérale sur la protection des données (Federal Act concerning the Protection of Data), of 19 June 1992.

10. Recueil de la législation fédérale en matière de séjour et établissement des étrangers (Compilation of federal legislation on the sojourn and establishment of foreigners) (RS 142.20, etc.)

11. Loi fédérale sur les droits politiques (Federal Act concerning Political Rights), of 17 December 1976 (RS 161.1).

Documents

12. Réponse du Gouvernement de la Suisse au Directeur de l'OIT sur les mesures prises contre l'apartheid (Reply by the Government of Switzerland to the Director of ILO on measures taken against apartheid), dated 10 November 1992.

13. Message du Conseil fédéral concernant la loi fédérale sur l'égalité entre femmes et hommes (Message of the Federal Council concerning the federal law on equality between women and men), dated 24 February 1993.

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* The annexes are available for consultation by members of the Committee in the Secretariat's files.

14. Rapport au Conseil fédéral de la Suisse relatif à la visite du Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT), et prise de position du Conseil fédéral (Report to the Swiss Federal Council relating to the visit by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, and the position taken by the Federal Council).

15. Réponse du Gouvernement de la Suisse, au Rapporteur spécial de la Commission des droits de l'homme sur l'intolérance religieuse (resolution 1990/27 du 2 mars 1990) (Reply by the Government of Switzerland to the Special Rapporteur of the Commission on Human Rights on the question of religious intolerance (resolution 1990/27 of 2 March 1990).

16. I. Krummenacher, "Lohnunterschiede zwischen Frauen und Männern, Auswertungen von Daten aus dem Kanton Genf", in *Volkswirtschaft* 4/93, p. 38 *et seq*.

17. G. Malinverni, "Fédéralisme et protection des minorités en Suisse", report submitted to the European Commission for Democracy through Law, document CDL (91) 21, dated 8 October 1991.

18. Enfance maltraitée en Suisse, final report submitted to the Head of the Federal Department of the Interior by the Working Group on Maltreated Children, June 1992.

19. Swiss Academy of Medical Sciences, Directives d'éthique médicale.

20. Statistiques des refus de servir en 1992 (Statistics on refusal to serve in 1992).

21. Statistiques du nombre de grèves et de lock-out, entreprises et travailleurs concernés et journées de travail perdues pour la période 1975/1991 (Statistics on the number of strikes and lockouts, enterprises and workers concerned and working days lost in the period 1975-1991).

22. Contrat type d'engagement d'artiste (Standard contract for the employment of artistes), prepared by the Swiss Association of Concert Cafés, Cabarets, Dancehalls and Discothèques.

23. Statistique des jugements pénaux des mineurs en 1993.

24. "Vers l'égalité? Aperçu statistique de la situation des femmes et des hommes en Suisse", (Federal Statistical Office, Bern, 1993.

Article 1

Paragraph 1

1. When the federal State was established, the 26 cantons and demi-cantons of the Helvetic Confederation renounced their sovereignty in favour of a central authority. This means, in particular, that a canton may be obliged to accept an amendment to the Federal Constitution against its will, since the Constitution may be amended by double *majority* of the people and of the cantons. Furthermore, a canton does not have the right of secession. Assuming, in theory, that a canton wished to leave the Confederation, that would require a majority decision of its inhabitants entitled to vote, followed by a vote of the people and of the cantons on the corresponding amendment to the Federal Constitution. In 1978, a similar procedure led to the establishment of the canton of the Jura, on territory that was previously part of the canton of Bern.

2. The cantons are, however, largely autonomous and free to determine their political organization, subject to the guarantee that the Federal Assembly must grant to their constitution. This guarantee is granted if the cantonal constitution contains nothing that is counter to the Federal Constitution, if it ensures the exercise of political rights, in a representative or democratic republican manner, and if it has been accepted by the people and may be revised by an absolute majority of the citizens (art. 6 of the Federal Constitution). Should the guarantee be refused, the cantonal constitutional law that does not fulfil these conditions is stripped of all legal force with effect *ex tunc*.

3. As regards the system guaranteeing the formation of the popular will on a federal basis, readers are referred to the relevant paragraphs in the core document that forms the general part of this report (HRI/CORE/1/Add.29) concerning the organization of federal powers and rights of constitutional initiative and legislative referendum. Here we would merely stress the importance of the popular rights that enable citizens to have their say on a large number of topics at federal, cantonal or communal level.

Paragraph 2

4. Natural resources play a limited part in the economic activity of the country. Economic development relies more on the processing and service industry sector, in which the export industry plays an important role. Switzerland is conscious of the growing interdependence of national economies and is implementing a policy to promote fairer trade, particularly with developing countries.[1]

5. Article 31 of the Constitution guarantees freedom of trade and industry. Trade and industry are, in general, dominated by private enterprises or individuals who, in the exercise of this freedom, exploit the country's natural resources. However, the Confederation or the cantons have a monopoly on some scattered activities, such as the manufacture and sale of gunpowder (article 41 of the Constitution) or the working of salt mines (canton of Vaud). The redistribution of wealth is assured by the cantonal or federal fiscal laws, which are subject to the people's approval.

Paragraph 3

6. Switzerland attaches great importance to respect for international conventions and customary rules governing relationships between States. It abstains from any interference in the internal affairs of other States, in compliance with its international obligations.

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[1] The initial report of Switzerland on the International Covenant on Economic, Social and Cultural Rights will give more details in this regard.

7. Switzerland is a committed supporter of human rights and humanitarian law. As the depositary State of the four Geneva Conventions on the protection of victims of war, as well as their two additional Protocols, it is unceasing in its support for the activities of the International Committee of the Red Cross, calling on all parties to an armed conflict to remember their obligations to comply with these agreements. The Federal Council has condemned the policy of apartheid unequivocally since the United Nations Conference on Human Rights at Tehran in 1968.[2]

Article 2

Paragraphs 1 and 2

1. General

8. As the report on the different articles of the Covenant will show, the rights embodied therein are broadly recognized in Swiss law. Article 4, paragraph 1, of the Federal Constitution (annexed) lays down the general principle of the equality of all individuals, without discrimination, as follows:

> Article 4
>
> "All Swiss are equal before the law. In Switzerland there are no subjects nor any privileges of place, birth, person or family."

9. The second paragraph of that article, introduced in 1981, with specific regard to equality between men and women, will be examined in the chapter dealing with article 3 of the Covenant.

10. The main aim that article 4, paragraph 1, of the Constitution was originally designed to achieve was to ensure political equality for citizens, to place all the cantons on an equal footing and to eliminate privileges attached to place or birth. Legal equality, however, has long since acquired the status of a general principle governing the entire Swiss legal order. It applies both in the realm of legislation (equality in the law) and in that of the application of the law (equality before the law).

11. As a constitutional principle, equality implies first and foremost the prohibition of unjustified distinctions but also, to some extent, a mandate for the legislator to reduce social inequalities and improve the individual's opportunities for personal fulfilment. Thus, in various parts of the Constitution, the Confederation is given the task of improving equality of opportunity. This is principally the case with regard to public education and training (art. 27, paras. 2 and 4, art. 27 *quater* and art. 34 *ter*, para. 1 (g) of the Constitution), social insurance (art. 34 *bis*, *quater*, *quinquies* and *novies* of the Constitution) or worker protection (art. 34 and art. 34 *ter* of the Constitution). It should be noted that article 113, paragraph 1 (3), of the Constitution requires the Federal Tribunal to apply, in every case, the federal laws and decisions of general scope adopted by the Federal Assembly, as well as the treaties ratified by it. This provision, which is democratically inspired since it is designed to prevent a court from declaring unconstitutional a text that has been submitted to an optional popular referendum and thus accepted by the people, even tacitly, nevertheless prevents monitoring of the constitutionality of federal laws and their conformity with basic constitutional rights. It may thus be said that there is no full federal constitutional monitoring. The rule embodied in article 113 of the Constitution does not, however, prevent the Federal Tribunal from noting the incompatibility of a federal law with the Constitution, thus prompting the legislator to remedy the situation.

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[2] See annexed the reply of the Swiss Government to the Director of ILO, dated 10 November 1992, on measures taken against apartheid.

12. One of the particular features of article 4 of the Swiss Constitution is the number and importance of the constitutional rights and principles that the case-law of the Federal Tribunal has derived from it. These jurisprudential rules are highly diverse (equality of treatment, the protection of good faith, prohibition of the denial of justice, of unjustified delay in giving a judgement and of excessive formalism, the right to be heard and the right to free legal assistance, the principle of legality and proportionality, and the non-retroactivity of legal provisions); some of them will be examined later in this report, particularly in the chapter dealing with article 14 of the Covenant.

13. Contrary to the letter of article 4 of the Constitution, the right to equality extends not only to Swiss citizens but also to aliens.[3] Equality is a universally applicable human right. The fact of being an alien may, however, constitute objective grounds for a difference in treatment where Swiss nationality plays a cardinal role in the matter to be regulated. This applies particularly in respect of civic rights and obligations. Likewise, article 69 *ter* of the Constitution gives the Confederation the right to legislate on the entry and exit of foreigners and on their sojourn (*séjour*) or establishment.[4]

14. Political utterances by foreigners are covered by a 1948 federal decision (see comments below on article 19). Access to higher communal, cantonal or federal public office is generally reserved for Swiss nationals, as authorized by article 25 of the Covenant. Likewise, case-law finds it compatible with article 4 of the Constitution to establish the legal exclusion of foreigners from certain occupations. For instance, the Federal Tribunal has ruled that the exercise of the profession of advocate can be reserved for Swiss citizens. However, it has admitted exceptions, particularly when it seemed unreasonable to require a candidate for the bar to acquire Swiss nationality (as in the case of foreign jurists who have studied law in Switzerland).[5] Finally, in its recent practice, the Federal Tribunal has agreed to extend freedom of trade and industry (article 31 of the Constitution) to foreigners holding an establishment permit, provided that they are legally admissible to certain occupations.[6]

15. Bodies corporate under private law may also avail themselves of article 4 of the Constitution. However, this right is guaranteed to bodies corporate under public law only within certain limits.

16. Whether at federal or cantonal level, the State monitors respect for the equality of conditions of access to the civil service.[7] Special efforts are made to promote women's access to all levels of the civil service (in this regard, see the comments below on article 3 of the Covenant).

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[3] ATF 93 I 1.

[4] This legislation is commented on below with reference to article 12 of the Covenant.

[5] Decision of the Second Court of Public Law of the Federal Tribunal of 24 February 1984. Published in ZBl. 1984, p. 457 *et seq.*, ATF 116 Ia 238 and 119 Ia 35.

[6] ATF 108 Ia 148.

[7] As an example, see the Federal Act containing the Regulations on Public Officials, dated 30 June 1927, RS 172.221.10 (annexed). See also the comments below on article 25 of the Covenant.

2. Specific measures against certain forms of discrimination

(a) Race and colour

17. Switzerland's accession to the 1965 International Convention on the Elimination of All Forms of Racial Discrimination was approved by Parliament in spring 1993. On that occasion, the Federal Parliament also approved a penal law amendment to punish racial discrimination. A referendum against these new articles in the Penal Code and the Military Penal Code gathered a sufficient number of signatures. The Penal Code amendment was therefore put to the people for approval and accepted on 25 September 1994. The new penal provisions will probably come into effect on 1 January 1995.

18. Currently, a number of criminal acts committed for racist reasons can be the subject of penal prosecution by virtue of the law in force, for example crimes against life and physical integrity, against property and against freedom, crimes and offences that constitute a public danger (in particular arson) and, though to a limited degree, offences against an individual's good reputation. However, as it stands the law does not cover all aspects of the problem. Above all, racist propaganda or the minimizing of genocide and racial persecution are not expressly condemned.

19. As indicated, in order to adapt Swiss law to the requirements of the Convention, the Penal Code and the Military Penal Code should therefore be supplemented by two articles establishing punishment, by a fine or by imprisonment, for racial discrimination, particularly appeals to race, ethnic or religious hatred, the dissemination of ideologies that systematically designate a racial, ethnic or religious group, rejection of services offered publicly on racist grounds and attacks on the human dignity of an individual because of that individual's membership of a race, ethnic group or religion. As far as prevention is concerned, efforts are being made in the federal administration to set up a Federal Commission on Racism whose responsibilities are as yet undefined.

(b) Sex

20. In this connection the reader is referred to the chapter on article 3 of the Covenant.

(c) Language

21. Switzerland, as a multilingual State with three official languages, as well as a fourth national language (Rhaeto-Romansch), is particularly aware of the difficulties that may arise in recognizing and implementing freedom of language. The Swiss approach to this will be set out in the chapter on article 27 of the Covenant.

(d) Opinion and religion

22. On these points the reader is referred to the chapters on articles 18 and 19 of the Covenant.

Paragraph 3

23. This provision corresponds to article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, applicable in Switzerland since 1974. Any individual who alleges the violation of his or her civil or political rights, as guaranteed by the Covenant, theoretically has effective recourse. The authorities competent to act in connection with human rights, as well as the recourse channels open to an individual who claims that his or her rights have been violated, are presented and described in the basic document forming the general part of this report.

24. In the case of violations committed by a person in the course of an official duty, cantonal or federal legislation on the responsibility of the State, the members of State authorities and State officials generally provides as follows:[8]

(a) **Liability arising from damage**: The State is liable for the damage inflicted on a third party by one of its officials in the course of his or her duties; the injured party has no right of action against the official concerned. The State may, however, exercise an action of recourse against the official if the act in question was intentional or the result of serious negligence.

(b) **Penal liability**: At federal level, in the case of members of parliament or magistrates elected by the Federal Assembly, the authorization of the Federal Chambers is required for the initiation of a penal action against them in respect of offences connected with their official situation or activities (removal of immunity). Along the same lines, with the exception of road traffic offences, officials may be prosecuted only with the authorization of the Federal Department of Justice and Police.

25. The authorization of the Federal Chambers is a matter for their sovereign judgement. However, the Federal Department may not refuse authorization if the conditions for penal prosecution seem to apply, unless the case is a trivial one. Its refusal may be referred to the Federal Tribunal by the injured party or the public prosecutor of the canton in which the offence was committed. In each canton, the relevant laws establish a system similar to that outlined above.

26. From article 4 of the Constitution the Federal Tribunal has derived prohibition of the formal denial of justice, of unjustified delay in reaching a decision and of excessive formalism. These three guarantees ensure that the competent authority will be able to rule on the rights of the individual who approaches it, in accordance with article 2, paragraph 3 (b), of the Covenant. An authority that expressly refuses or tacitly omits to rule, when required to do so, commits a formal denial of justice.[9] An authority that fails to take the decision incumbent on it within the time-limit set out in the law or in a time-limit that the nature or importance of the matter, as well as any other circumstances, indicates as being reasonable, commits an unjustified delay in ruling.[10] Article 4 of the Constitution is infringed when an authority that has been called upon to rule commits an excess of formalism which is not justified by any interest worthy of protection and which needlessly complicates the application of the material law.[11] In such cases, the recourse jurisdiction will enjoin the authority concerned to rule without delay. In order to preserve the principle of the plurality of instances, it may not, however, rule in the place of the competent authority.

27. It is one of the responsibilities of the executive to monitor the proper application of the law and of decisions and judgements that have become *res judicata*, if need be by recourse to compulsory measures.

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[8] For example, the Federal Law on the Responsibility of the Confederation, the Members of its Authorities and its Officials, of 14 March 1958, RS 170.32 (annexed).

[9] ATF 107 Ib 164.

[10] ATF 108 Ia 169.

[11] ATF 108 Ia 290.

Article 3

1. Constitutional and legislative aspects

28. Article 4, second paragraph, of the Federal Constitution reads as follows:

> "Men and women have equal rights. The law provides for equality, in particular in the areas of the family, education and work. Men and women are entitled to equal pay for work of equal value."

29. This provision, accepted by the people and the cantons on 14 June 1981, contains three features: firstly, there is a fundamental right (first sentence); secondly, it gives the legislator a mandate to provide for equality (second sentence); finally, it guarantees the right to wage equality, as a special fundamental right (last sentence).

30. The principle in article 4, paragraph 2, first sentence, is threefold: it is an imperative rule, applicable to all State authorities. It is also a fundamental right of direct application that may be invoked in the courts both by men and by women.

31. Article 4, paragraph 1, first sentence, prohibits any sex discrimination. This prohibition allows only two types of exceptions. Firstly, there are exceptions that result from other constitutional provisions. Today all that remains are articles 18 and 22 *bis* of the Constitution, whereby women are released from the obligation of military service[12] and civil defence. Secondly, different treatment may be justified and may even be necessary when a biological difference absolutely excludes the possibility of equal treatment. Hence, protection during pregnancy and motherhood may justify different treatment.

32. The legislative mandate (art. 4, para. 2, second sentence): equality of rights, as well as equality of opportunity, for the sexes must be a prime consideration of the legislator, who is given an explicit constitutional mandate on this point, particularly in the three crucial areas of family, education and employment. At all levels, whether federal, cantonal or communal, provisions must be drafted in such a way as to guarantee *de jure* parity and to promote de facto equality of men and women.

33. Article 4, paragraph 2, second sentence, enables the legislator to adopt measures in favour of women to eliminate de facto discrimination against women in society (affirmative action). These measures are an exception to the prohibition on discrimination in article 4, paragraph 2, first sentence. None the less, they should be admitted with reference to article 4, paragraph 2, second sentence, to the extent that they comply with the principle of proportionality (suitability, necessity, subsidiarity and weighing of interests with other public interests affected) and are based on an adequate legal foundation.

34. The legislative mandate in this provision is being applied gradually. Following a parliamentary intervention ("motion"), the Federal Council published a report in 1986 on the legislative programme "equality of rights for men and women". This establishes, with a view to eliminating them or modifying them, a catalogue of provisions that do not reflect the principle of equality between men and women. Although many reforms have already been implemented to date, others are still in progress or pending.

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[12] In accordance with the Order on Women's Service in the Army, dated 3 July 1985 (RS 513.71), women may serve in the army on a voluntary basis. The service conditions are not the same as those applicable to men. In 1970, 101 women soldiers were trained. By 1980 the number had risen to 326. In the years from 1990 to 1992 the numbers were 95, 63 and 64 respectively.

35. With reference to inequalities that have now been eliminated, special mention should be made of voting and eligibility rights, granted to women at federal level by vote on 7 February 1971, after several fruitless attempts. Although women had these rights earlier in certain cantons (Neuchâtel and Vaud, as from 1959; Geneva, as from 1960; Basel-Town, as from 1966; Ticino, as from 1969; Valais, Basel-Country, Lucerne and Zurich, as from 1970), other cantons were less willing to grant them. It was only after a ruling of the Federal Tribunal on 27 November 1990, on the basis of article 4, paragraph 2, of the Constitution, that the demi-canton of Appenzell Inner-Rhoden became the last to give women citizens the right to vote and to be elected at cantonal and communal level.

36. The law governing marriage was also revised, as from 1 January 1988. The new law has contributed greatly to eliminating the dominant role of the man in the family, encouraging partnership of the spouses with equality of rights and obligations. It has also reappraised the education and upbringing of children, as well as the balance of work in the home and occupational activities. The rights of inheritance of the surviving spouse have been strengthened and the ordinary matrimonial arrangement (sharing of acquired assets) respects the equality of the spouses. Finally, the wife may, if she so wishes, keep her family name after marriage. She must then use it along with and before that of her husband, whose name is taken by the children.[13]

37. It should be noted that the portion of the Civil Code relating to the conclusion of marriage, divorce, marital status, filiation, alimony and guardianship is currently being revised.

38. With regard to the acquisition and loss of Swiss nationality, the law has also been amended to provide for equality between men and women. The new legislation, effective since 1 January 1992, sets the same conditions for both sexes for the acquisition of nationality. Whereas a wife used to become Swiss by marriage to a Swiss national, the foreign spouses of a Swiss man or woman now qualify, regardless of sex, for facilitated naturalization. A Swiss woman who marries a foreigner no longer automatically loses her Swiss nationality (as used to be the case unless she made an express declaration).[14]

39. The law on the sojourn and establishment of foreigners has also undergone a few changes: since 1 January 1992 the foreign spouses of Swiss nationals have the same right to receive permits of sojourn (*autorisations de séjour*) and extensions thereto. Sex equality is also respected regarding establishment permits (*autorisations d'établissement*).

40. The legislation on social welfare and employment is being revised and a draft law on maternity insurance is being prepared. These matters will be covered by the initial report of Switzerland on the International Covenant on Economic, Social and Cultural Rights.

41. Wage equality (art. 4, para. 2, third sentence): because of its importance, this is the subject of a special provision. The right to wage equality is both a fundamental right and an imperative rule of civil law. Contrary to other individual rights, which can only be asserted *vis-à-vis* the State authorities, this right may be invoked in the courts also with regard to relations between individuals. As an imperative rule of civil law, it is included in the regulations on public officials and the law regarding employment contracts. Its field of application is general, covering the civil service[15] and private law relationships. It means that male and female employees receive the same wage for the same work or work of equal value. This does not refer only to the wage itself, but also to family allowances and other work-related benefits. The right to equal remuneration also covers activities that are different but of equal value.[16] There is debate as to whether equality should refer to a single enterprise or to the entire economic branch concerned, particularly when wages are governed by a collective labour agreement.

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[13] Regarding the new marriage law, see the comments below on article 23 of the Covenant.

[14] Regarding the reform of the law governing nationality, see the comments below on article 23 of the Covenant.

[15] ATF 106 Ib 190; 109 Ib 88.

42. Despite the fact that article 4, paragraph 2, of the Constitution was introduced back in 1981 and that wage equality is a directly applicable principle, its practical implementation is still far from complete, particularly in private sector enterprises. We also note that women form the majority of the labour force in the lowest paid jobs. Some informed sources say that women today earn on average between 20 and 40 per cent less than men for work of equal value.[17]

43. There are also other factors causing work-related inequality. Particular mention should be made of the system of family allowances and occupational insurance which are designed for individuals working full time and penalize persons (mainly women) who work part time. Finally, sexual harassment in the workplace applies almost exclusively to women.[18] The Federal Council is aware of the scope and importance of the work still to be done to achieve sex equality in employment and, on 24 February 1993, it presented a message concerning a federal law on equality between men and women. Although this is designed essentially to facilitate respect for the right to equal wages, guaranteed by the last sentence of article 4, paragraph 2, of the Constitution, it is more generally designed to bring about sex equality in the employment field.

44. The main innovations in the future law are: prohibition on sex discrimination in employment; easing of the evidence rules so that, when a female worker can give probable indication of discrimination, it is for the employer to prove that there has been no discrimination; right of action and recourse conferred on trade unions and organizations concerned with sex equality; increased protection against sexual harassment (see below); possibility of obtaining damages for retaliatory dismissal; obligation on the cantons, which are competent in this area, to establish a conciliation process.

45. Financial assistance is also envisaged, in order to promote the establishment of programmes of action (for example, in occupational training) by public or private organizations to promote equality of men and women. If the law, currently before Parliament, is passed it may come into effect in 1995. The struggle against sexual harassment should be highlighted in action by the State to promote sex equality in employment. This is possibly the most serious form of sex discrimination in the workplace. Women are all the more exposed because their conditions of employment are precarious and because they therefore have little scope to defend themselves without risking retaliation. This is why the draft law sets out to establish the responsibility not only of the perpetrator of such action (he is already criminally liable, by virtue of articles 197 *et seq.* of the Penal Code), but also the employer, when circumstances indicate that he has failed to take all reasonable steps to prevent or eradicate sexual harassment.

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[16] ATF 117 Ia 262, 117 Ia 270, ZBl. 90/1989, p. 203 and ZBl. 84/1983, p. 277.

[17] Figures published by the weekly *Domaine public*, No. 1121, of 25 March 1993. It should be stressed that, because of their global nature, these figures are of little use in giving an accurate picture of the situation regarding wage differences between the sexes and establishing that such discrimination exists. Only statistics relating to comparable population groups (skill, working week, occupational experience, age, economic branch, field of activity) would be really conclusive. As it happens, a survey incorporating the majority of these parameters exists only for the canton of Geneva. See I. Krummenacher, "*Lohnunterschiede zwischen Frauen und Männern, Auswertungen von Daten aus dem Kanton Genf*" (Wage differences between men and women, examination of data for the canton of Geneva), in *Volkswirtschaft* 4/93, p. 38 *et seq.* (annexed). Also see the comments below under "2. Practical measures and quantified data".

[18] According to a survey conducted in the canton of Geneva, 59 per cent of women questioned admitted that they had encountered this problem in the past two years. This proportion is clearly greater among women whose occupational status is precarious (low level of training, low pay, foreigners with a short-term or seasonal permit of sojourn and unregistered workers).

46. New measures will clearly be necessary in other areas, such as social, family or training policy. These initiatives are the responsibility not only of the Confederation, but also of the cantons and the social partners themselves.

2. Practical measures and quantified data[19]

(a) Offices of Equality

47. In order to promote equality between men and women, "Offices of Equality between Men and Women" have been established. They currently exist at federal level and in 12 cantons or communes. These numbers should increase in the near future. For instance, the activities of the Federal Office of Equality between Men and Women can be summarized as follows: the Office's task is to promote sex equality in all areas of life in society. It strives to eliminate all forms of discrimination against women and prepares decisions and measures designed to promote and ensure equality. It works in collaboration with the cantonal, communal or non-governmental organizations that are active in this field. It advises authorities and individuals and prepares and supports efforts to promote sex equality. It is responsible for informing public opinion on equality and reporting periodically on its activities, the implementation of the legislative programme on equality of men and women and on the true situation and progress achieved. In this context, it is involved in the preparation of the reports that Switzerland submits to the organs supervising human rights conventions. Currently, the Federal Office of Equality, which reports to the Federal Department of the Interior, has five female members, four of them working part time.

(b) Representation of women in political life and public service

48. The following figures reflect the involvement of women in political life: in May 1993, 19.3 per cent of members of cantonal parliaments were women. Nine cantonal executives had at least one woman in their ranks, while the other 17 were exclusively male. The 1991 elections brought in 35 women members of the National Council (i.e. 17.5 per cent) and four women members of the Council of States (i.e. 8.7 per cent). Since 1 April 1993, for the second time in history, the Swiss Federal Council has a woman member. The Federal Tribunal has three women judges, one woman alternate judge and no women extraordinary alternate judges. There is only one woman among the 18 judges of the Federal Insurance Court.

49. It should also be mentioned that, on 18 December 1991, the Federal Council issued directives on the promotion of women in the federal administration. Pursuant to these directives, when a post attracts a woman candidate with equal qualifications, preference must be given to women while they are underrepresented in the administration. Certain cantons have promulgated similar provisions. A staffing table for the federal administration, broken down by remuneration, sector and sex, is annexed.

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[19] Most of the figures given below are taken from the message of the Federal Council concerning the federal law on equality between women and men, dated 24 February 1993 (annexed). The reader is also referred to the survey by the Federal Office for Industry, Arts and Crafts and Labour on wages and benefits paid in October 1991, as well as *"Vers l'égalité? Aperçu statistique de la situation des femmes et des hommes en Suisse"* (Towards equality? — a statistical overview of the situation of men and women in Switzerland), Federal Statistical Office, Bern, 1993 (annexed).

(c) Occupational training

50. The number of women in schools of higher education decreases as the level of training rises; hence, although virtually as many girls as boys obtain a school-leaving certificate, only three university teaching chairs out of nearly a hundred are held by women.

51. In the winter 1989/1990 semester, 37.7 per cent of students in higher education in Switzerland were female. At the moment, only the University of Geneva, with 52.3 per cent women students, has a female majority. Nationally, 17.9 per cent of female students study languages and literature, 16.6 per cent social sciences or sport, 11.9 per cent law and 11.2 per cent medicine. It is in the exact sciences, with the exception of architecture and earth sciences, that women are most clearly underrepresented.

52. According to the figures provided by the Federal Statistical Office, the number of women who have received occupational training has increased by 3 per cent in the last ten years. In the school year 1991/1992, women accounted for 41.6 per cent of numbers at occupational training schools, compared with 38.9 per cent in 1980/1981. In the same period, the statistics show a slow but constant increase in the number of women in the so-called "male" occupations. Consequently, the proportion of women in the industry and crafts sector is now 9.1 per cent, as against 6.6 per cent ten years before; in the technical professions, 23.9 per cent, as against 19.3 per cent; in the legal and public order sectors, 17 per cent, as against 9.7 per cent. The greatest advance is in the transport sector, in which the proportion of women has risen from 32.7 per cent to 47.7 per cent of all workers in the sector.

(d) Remuneration

53. A survey on wages and salaries conducted in 1990 shows that, in Switzerland, as in other countries, women are generally less well paid than men and there is a wage gap of about 30 per cent.[20] In 1990, therefore, looking at all workers, a man earned 4,620 francs a month on average, as against 3,319 francs for women. The hourly wage for a male skilled manual worker was 24.50 francs, as against 16.75 francs for a female skilled manual worker. Among white-collar workers, men earned an average of 5,484 francs and women 3,781 francs per month. These disparities also increase as the level of training increases. Thus, a comparison of the annual wage of young university graduates of both sexes shows a difference of about 5,000 francs (8,000 francs in the case of married persons) on average, to the detriment of women.

(e) Participation of women in occupations

54. About 55 per cent of women over the age of 14 years have a money-earning activity for at least one hour per week. The corresponding figure for men is 80 per cent. Although the percentages are comparable for both sexes between the ages of 14 and 24 years (67 per cent having a money-earning activity), between the ages of 25 and 49 years only 75 per cent of women, as against almost 100 per cent of men, are economically active. Fifty-six per cent of women with children under 14 years of age have a money-earning activity, usually on a part-time basis.

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[20] October 1990 survey of wages and benefits, in *Vie économique* 9/91, p. 32 *et seq*.

(f) Modalities of employment

55. Eighty-four per cent of those who have a part-time occupational activity are women. In fact, full-time employment is the rule only for young women without children. There is clearly a link between the time spent at work and the family situation. Most women have a full-time money-earning activity when they have no children aged under 14 years. The exercise of a part-time activity is thus a specific feature of female employment, closely connected with the presence of children aged under 14 years. Although part-time work may be perceived as an opportunity for women, in that it enables them to reconcile a money-earning activity with family life, it is also an appreciable obstacle to the realization of true equality of men and women. For instance, this form of work has negative repercussions on social insurance benefits and often does not provide sufficient income to enable women to support themselves independently. It also perpetuates the traditional division of roles between the sexes. These factors should be borne in mind when implementing an equality policy.

(g) Occupational situation

56. Men and women do not have the same jobs, whether with regard to the occupation carried out, the branch concerned or the position occupied in the occupational hierarchy. These differences show a degree of sexual segregation on the employment market: the 1980 population census revealed that almost half of the 541 listed occupations were dominated by men (over 90 per cent). Only a tenth of the total number of occupations were dominated by women (over 90 per cent).

57. Thus, there is a clear predominance of women in the following occupations: health, education and other services, restaurants and retail sale. On the other hand, women are extremely underrepresented in industry, crafts, construction, insurance and banking. In some occupations there are scarcely any men (keyboard operators, pharmacy assistants, qualified nurses, kindergarten teachers, etc.). The occupations in which women are very well represented generally reflect the traditional role they are given in society and are frequently less prestigious and less well paid than the typically "male" occupations.

58. As far as the position in the occupational hierarchy is concerned, about one third of self-employed people or employed people occupying supervisory positions are women. At management level, women make up only a fifth of the total. The proportion of women heads of enterprises or general managers is 1.5 per cent, while they occupy 17 per cent of the senior supervisory positions.[21]

Article 4

Paragraph 1

59. The 1874 Federal Constitution contains provisions applicable in time of emergency or crisis.

60. Pursuant to article 89 *bis* of the Constitution, federal decrees of general scope whose entry into force admits of no delay may be put into effect immediately by a decision of the majority of all the members of each of the two Chambers of the Federal Parliament. The duration of their application must be limited. When a popular vote is demanded by 50,000 active citizens or by eight cantons, federal decrees brought into force urgently become invalid one year after their adoption by the Federal Assembly unless they have been approved by the people within that time. Federal decrees that derogate from the Constitution must be ratified by the people and the cantons within the year following their adoption by the Federal Assembly. Failing this, they become invalid at the end of this period and may not be renewed. These so-called urgent procedures relate only to texts of general scope and not to concrete decisions in particular cases. They may, however, be pertinent in the case of specific decisions, in so far as such decisions require a legal basis in principle.

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[21] The study "*Schweizer Kadergehälter 1992*" see *Schweizer Handels Zeitung* No. 36, of 3 September 1992.

61. On the basis of the "general police clause" in article 102, paragraph 10, of the Constitution, the federal executive may also adopt measures to deal with any serious danger offering a direct threat to the legal exercise of the public authority, or even the life, health or property of citizens.[22] Article 102, paragraph 9, of the Constitution also provides for similar powers in the case of a serious threat from another country to the security or independence of Switzerland. The Federal Government may avail itself of this competence by specific decisions or normative provisions. This competence does not, however, in principle permit derogation from the Constitution or the laws in force. Thus the general police clause may only be used to supplement current laws, not to derogate from them. Any measure that impairs fundamental rights must also adhere to the principle of proportionality.

62. In addition to the aforesaid constitutional provisions that are applicable in time of emergency, but do not permit derogation from the fundamental rights set out in article 4 of the Covenant, there is a concept of the law of necessity. The law of necessity is the law that applies when the very existence of the State is threatened and the constitutional procedures (including those described in the preceding sections) are no longer sufficient to avert the danger. This doctrine very clearly acknowledges that, in such cases, the highest political organs of the State have both the power and the duty to take the steps required, since the existence of the State cannot be sacrificed, in such circumstances, to respect for the Constitution. In such situations that threaten the existence of individuals and the State, it is therefore acceptable for the competent authorities to adopt the necessary measures to safeguard the existence and independence of the country. This competence lies, in the first place, with the Federal Assembly. When the Federal Assembly proclaims the law of necessity, popular rights (referendum) are suspended. This competence lies, in the second place, with the Federal Council. It is also possible for Parliament to delegate its power to the Federal Council. Such delegation of powers has occurred twice in the history of Switzerland: during the two world wars, 1914-1918 and 1939-1945. It has not happened since then. The competence to proclaim the law of necessity lies with the Federal Council if the Parliament is no longer able to take valid decisions and cannot thus use its decision-making or delegational power with regard to the law of necessity. Such a situation has not yet occurred.

63. The law of necessity, as described above, is subject to the following principles:

> It may only be proclaimed if there is a true state of necessity. This may be expressed legally by the principle of proportionality. It follows, in particular, that measures not required by the state of necessity must be adopted according to the ordinary constitutional procedure.
>
> The exercise of competence with regard to the law of necessity must be subject to the political control of the Federal Assembly, which must be able to decide periodically on whether to extend the validity of the decisions taken. In any event, this was the approach followed in the two world wars. This control is to be dispensed with only if part of the Parliament should be unable to meet for that purpose.

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[22] ATF 60 I 121.

Paragraph 2

64. The rights mentioned in article 4 of the Covenant (as is also the case of those set out in article 15, paragraph 2, of the European Convention for the Protection of Human Rights and Fundamental Freedoms) are in no way jeopardized in Switzerland, as regards their essential content, even in cases of exceptional danger threatening the existence of the nation.

65. With particular reference to the right to life (article 6 of the Covenant), Swiss law has recently completely abolished the death penalty, which was still included in the Military Penal Code for the most serious crimes committed in wartime. Switzerland recently ratified the Second Optional Protocol to the Covenant, thus making an international commitment not to reintroduce the death penalty (see also *infra ad* article 6 of the Covenant).

Article 5

Paragraph 1

66. This provision is an interpretative clause that mirrors article 17 of the European Convention on Human Rights and prohibits abuse in the exercise of the rights recognized by the Covenant, whether by an individual or by a public authority. In the Swiss legal order, over and above the rights recognized in the Covenant or in the European Convention, there is a general principle, set out in article 2 of the Civil Code, that is taken into account by the courts when they rule on claims that bring rights into opposition in order to hinder their application.

Paragraph 2

67. In Switzerland, the silence of a treaty on a particular matter has no *a contrario* effect on the express provisions of conventions or laws. The case-law of the Federal Tribunal concerning the European Convention on Human Rights indicates that the Convention has autonomous scope only when it accords more effective protection than the domestic legal system. In such a case, less favourable domestic legislation may not be invoked against it. This principle also applies to the Covenant.

Article 6

Paragraph 1

68. The right to life is the supreme right of the human being. It is guaranteed by the Federal Constitution and by article 2 of the European Convention on Human Rights, ratified by Switzerland on 28 November 1974.

69. Title 1 of book 2 of the Swiss Penal Code (annexed) lays down rigorous or ordinary imprisonment (or even a fine) as punishment for the different forms of homicide or endangerment of the lives of others, depending on the seriousness of the case. The law specifically punishes assassination (art. 112 of the Penal Code), murder (art. 111 of the Code), murder at the victim's request (art. 114 of the Code), incitement or assistance of suicide (art. 115 of the Code) and infanticide (art. 116 of the Code).

70. The aforesaid provisions are of general application and the members of the police forces and other officials are also subject thereto. Offences committed by soldiers on duty or by officials and employees of the Confederation and the cantons, to the extent that their acts relate to national defence, come under military law and justice, but may be tried by the civil courts in cases involving offences not covered by the Military

Penal Code.[23] As in any legal system, the rules regarding the state of necessity, self-defence and the duties of a person's function (arts. 32 to 34 of the Penal Code) may, under certain conditions, override the illegality of jeopardizing the right to life. Article 2, paragraph 2, of the European Convention on Human Rights also envisages cases in which inflicting death may not be deemed a contravention of this article. It is, however, necessary for the life or integrity of a person to be at stake. Attacks, even serious attacks, on material assets cannot justify the killing of the perpetrator on the basis of articles 32 to 34 of the Penal Code.

71. General remedies are available to victims of illegal attacks on the right to life to press their right to compensation.[24] If applicable, they will be covered by the recent Federal Law on Assistance to Victims of Offences.[25]

72. Each canton has its own police force, which it administers freely, in compliance with federal law and international provisions protecting the fundamental rights of the individual. With this in mind and for the purpose of harmonization, the Conference of Cantonal Police Commanders adopted a "Standard Regulation on the Use of Firearms by the Police" in March 1976. This text authorizes the use of firearms in proportion to the circumstances and after prior warning (perhaps a warning shot) in the following cases:

If the police or a third party are under attack or threat of imminent attack;

If a person who has committed or is strongly suspected of having committed a crime or a serious offence attempts to evade arrest or escape from custody;

If the police can or must deduce from information received, or from their own findings, that a person representing a serious and imminent danger to the life or health of another is attempting to evade arrest or escape from custody;

To free a hostage;

To prevent a serious and imminent criminal attack on installations serving the community whose destruction would cause the community serious damage.

73. In each of these situations, the police official is required to come to the aid of the wounded person and to notify his superiors immediately.

74. The Standard Regulation has been transposed into the laws and orders governing the cantonal and communal police forces in all cantons. With regard to the Federal Tribunal, it has ruled that "in order to assess whether and when a police officer may, using his firearm, jeopardize legally protected goods, it is necessary to refer to the special provisions that normally apply (service regulations, instructions, laws on the police)". In the same decision, dated 13 December 1985, the Federal Tribunal found that, although a police officer may seek to justify his behaviour by invoking the cantonal rules governing his duties, his intervention must always be necessary and in proportion to the circumstances. The Federal Court has ruled that the interest of capturing a fleeing suspect who is not armed and does not seem to be dangerous cannot, as a general rule,

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[23] See the core document forming the general part of this report (HRI/CORE/1/Add.29).

[24] On this matter, see the core document forming the general part of this report (HRI/CORE/1/Add.29).

[25] The content of this law is described in the core document forming the general part of this report (HRI/CORE/1/Add.29).

justify the use of a firearm involving a risk to the life or physical integrity of the fleeing individual (ATF 111 IV 113).

75. The Human Rights Committee, in its general observations 6 (16) and 14 (23), expressed its concern that war and other acts of collective violence continue to be a scourge of humanity and to take the lives of thousands of innocent human beings each year. Switzerland shares this concern. This was one of the reasons why the Federal Council decided, in 1988, to intensify Switzerland's support for international community efforts to seek the peaceful settlement of disputes. Switzerland regularly makes health personnel and observers available to the United Nations.

76. Switzerland also carries out a policy of cooperation in development, one of the important components of which is humanitarian aid. This is designed, above all, to provide immediate relief of the most acute manifestations of underdevelopment, as well as the suffering caused by armed conflicts or natural disasters. It takes different forms: contributions, in cash or in kind, to different international humanitarian organizations, such as the Office of the United Nations High Commissioner for Refugees, the World Food Programme or the International Committee of the Red Cross, as well as mutual assistance operations, action by the Swiss Disaster Relief Corps, etc.

Paragraphs 2 to 6

77. The death penalty, proscribed by article 65 of the 1874 Federal Constitution for political crimes, was abolished, in respect of all crimes committed in peacetime, by the 1937 Penal Code which came into force in 1942, although it remained applicable in wartime under the 1927 Military Penal Code. In the 1970s and 1980s, there were several fruitless attempts to abolish the death penalty in military penal law or to reintroduce it in ordinary penal law. Finally, on 1 September 1992, the death penalty was completely abolished in Switzerland. This penalty can no longer be reintroduced under the law of necessity, even in the event of imminent danger of war or in wartime. This conclusion is based in particular on article 2 of Additional Protocol 6 to the European Convention on Human Rights, which became effective in Switzerland on 1 November 1987. In December 1993, the Federal Chambers approved the ratification of the Second Optional Protocol to the present Covenant. Switzerland's instrument of accession to that Protocol was deposited on 16 June 1994. This Protocol came into effect in Switzerland on 16 September 1994, making the abolition of the death penalty irrevocable.

Article 7

General principles

78. In Switzerland, several rights embodied in the Constitution and in international treaties protect the individual against torture and cruel, inhuman or degrading treatment. Article 64, paragraph 2, of the Federal Constitution expressly forbids corporal punishment. This article absolutely prohibits penalties that are likely to directly affect the physical integrity of the individual.[26]

79. Since 1963 the Federal Tribunal has recognized the unwritten constitutional right to personal freedom. The Tribunal sees it as a condition of the exercise of all other freedoms of the individual and, therefore, as a universal, inalienable and imprescriptible right. Personal freedom protects the individual's physical and mental integrity.[27] According to federal case-law, it is inadmissible to use methods and measures, such as torture, which have the effect of destroying the personality of the individual, which can inflict serious mental disturbance or which are in any other way contrary to the dignity of the human being.[28]

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[26] ATF 99 Ia 280.

80. Article 3 of the European Convention on Human Rights prohibits torture and inhuman or degrading treatment or punishment. Anyone claiming a violation of this provision may refer the matter to the jurisdictional organs indicated by the Convention.

81. The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment came into force in Switzerland on 1 February 1989. This treaty establishes a non-judicial preventive control mechanism, based on visits by the European Committee for the Prevention of Torture to any place where persons are deprived of their liberty by a public authority (article 2). A visit of this kind was made to Switzerland from 21 to 29 July 1991. It was the subject of a report by the European Committee for the Prevention of Torture that was made public by the Federal Council.[29] According to the report, the delegation of the European Committee for the Prevention of Torture heard no allegation of torture in the establishments visited in Switzerland and received no other information regarding torture.[30] However, with reference to police stations, the Committee concluded that the risk of being mistreated while in police custody could not be discounted.[31] In more general terms, it found a number of problems relating to detention conditions that led it to make recommendations that the competent authorities have, in most cases, followed.[32]

82. By ratifying the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1986, Switzerland made a universal commitment to respect the physical and mental integrity of the individual. Switzerland has so far made two reports to the Committee against Torture, established by the Convention (CAT/C/5/Add.17 and CAT/C/17/Add.12). This report summarizes the main points in those two documents, to which reference should be made for more information.

83. Swiss law does not categorize torture as such as a specific criminal offence. None the less, the Federal Tribunal has stressed that the prohibition on torture and other inhuman or degrading treatment is a general principle of the right of individuals that must be respected by all authorities as *jus cogens*.[33] In the view of the Swiss Federal Council, this prohibition allows for no derogation, since torture and inhuman or degrading treatment constitute one of the most serious violations of human rights.[34]

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[27] For example, ATF 102 Ia 279; 104 Ia 480; 106 Ia 277.

[28] See the last decision mentioned in the previous note.

[29] The report dated 7 February 1992 (document CPT/Inf. (93) 3), as well as the position taken by the Swiss Government thereon, dated 14 December 1992 (document CPT/Inf. (93) 4), are annexed.

[30] Report by the European Committee for the Prevention of Torture, p. 62, No. 144.

[31] Ibid., p. 65, No. 157.

[32] See the comments of the Swiss Government, dated 14 December 1992 (annexed).

[33] ATF 108 Ib 408.

84. Acts that constitute torture[35] are punishable by application of the special provisions of the Penal Code, applicable to officials and other persons acting officially, as set out in article 13 of the Federal Law on the Responsibility of the Confederation (annexed). The following articles are particularly relevant here: article 111 *et seq.* of the Penal Code (homicide), article 122 *et seq.* of the Code (bodily injury), article 127 *et seq.* of the Code (endangering the life or health of another), article 180 *et seq.* of the Code (crimes and other offences against freedom, such as threats and coercion), article 187 *et seq.* of the Code (attacks on sexual freedom and honour) and article 312 of the Code (abuse of authority). As in the case of all crimes and offences, attempts to commit the above-mentioned acts, instigation and complicity also constitute offences (articles 21 to 25 of the Code). In military criminal law, when the execution of an order constitutes a crime or an offence, the person who gave the order is punishable as a perpetrator. The subordinate is also punishable in the same way if he was aware (or should have been aware) that, by executing the order, he was participating in the perpetration of a crime or an offence (article 18 of the Military Penal Code). It should be borne in mind that the Swiss Penal Code and the Military Penal Code make no provision for the death penalty or corporal punishment and that the Military Penal Code contains special provisions to punish violations of the rights of individuals in armed conflicts (articles 108, 109, 112 and 114 of the Military Penal Code).

85. For information on compensation for victims of acts of torture, as well as the remedies available to them, the reader is referred to the core document constituting the first part of this report (HRI/CORE/1/Add.29). As regards the liability of State agents and officials, the comments set out above on article 2, paragraph 3, of the Covenant are also relevant here. Furthermore, both at federal and cantonal level, there are surveillance measures designed to prevent acts of torture committed by public officials against prisoners. In particular, there is hierarchical control of the penal examination procedure (monitoring by a second-degree jurisdiction or another authority), the provision to individuals of information on the judicial remedies open to them, monitoring of the institutions where punishments are served and the requirement for official approval of their internal regulations by the executive, the establishment of several monitoring instances (examining magistrate, government procurator, special commission, police directorate, etc.) or the obligation to record disciplinary punishments imposed on prisoners in an official register.

86. Switzerland is conscious of the fact that it is incumbent on the entire international community to combat torture and is therefore implementing an active policy against torture. Switzerland is committed, bilaterally and multilaterally, to providing persons deprived of liberty with better protection against torture and cruel, inhuman or degrading treatment or punishment. For instance, Switzerland took the initiative, with Costa Rica, in relation to the draft optional protocol to the United Nations Convention against Torture (E/CN.4/1991/66), which envisages the establishment of an international committee of independent experts subordinate to the Committee against Torture, which will be able, at any time, to visit any place where persons are detained by a public authority.

87. Switzerland, through its contributions to the United Nations Voluntary Fund for Victims of Torture, the very substantial share it bears in the cost of the visits which the International Committee of the Red Cross makes to prisoners and its financial support for various non-governmental organizations (International Commission of Jurists, Swiss Committee against Torture, International Association against Torture, etc.), is participating financially in programmes of protection against torture and assistance to its victims.

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[34] Message of the Federal Council, dated 30 October 1985, concerning the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Feuille fédérale* (Official Journal of the Confederation) 1985 III, p. 273.

[35] The term "torture" is henceforth taken to include cruel, inhuman or degrading treatment or punishment.

88. Furthermore, Switzerland intervenes at a bilateral level, through the diplomatic channel, on a case-by-case basis on behalf of persons of all nationalities whose physical or mental integrity has been seriously violated and, more generally, on behalf of persons whose other fundamental rights, such as freedom of movement, thought and expression, have been unduly limited. For this purpose, the Federal Department of Foreign Affairs, through its network of diplomatic missions, maintains, in Switzerland and abroad, sustained relations with organizations working for the defence of human rights, which are valuable sources of information.

Particular aspects

Provisions allowing confessions or other statements obtained by torture to be declared inadmissible in court

89. In accordance with article 249 of the Federal Act of 15 June 1934 concerning Federal Penal Procedure, the cantonal codes of penal procedure give the judge freedom to assess evidence. The judge is therefore at liberty to decide, as he sees fit, on the validity of the evidence submitted to him. The forms of evidence are not always limited in cantonal procedural laws. However, the case-law of the Federal Tribunal considers absolutely contrary to Swiss public policy the use (and, consequently, the admissibility) of certain methods of obtaining evidence that a State based on law cannot tolerate. This refers, in particular, to coercion and torture, but also to the use of procedures or substances which have the effect of annihilating consciousness such as a truth serum, a lie detector or investigation using drugs.[36]

90. Some cantonal constitutions also expressly prohibit the use by the organs of penal procedure of excessively rigorous methods or coercion designed to obtain confessions. These rules, which merely put in concrete form the notion of "personal freedom", have no autonomous scope protecting the individual beyond the scope of federal law.

Holding detainees incommunicado

91. In its initial report to the Committee against Torture, Switzerland stated that holding someone incommunicado, a measure that is known in a minority of cantons, is criticized by Swiss writers on law with reference to the prohibition on cruel, inhuman or degrading treatment.[37] Such solitary confinement is a quite exceptional measure, drastically limiting the accused's contacts with the outside world for a limited period, in particularly serious cases, where the purpose of the investigation so requires and cannot be achieved otherwise. In view of this, the procedure has not been deemed contrary to article 3 of the European Convention on Human Rights by the organs responsible for implementing that Convention.[38]

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[36] ATF 109 Ia 273.

[37] See document CAT/C/5/Add.17, pp. 5 and 6, para. 26 *et seq.*

[38] See, in particular: Decision of the European Commission of Human Rights of 12 July 1978 in the Bonzi case, *in* DR 12, p. 185 *et seq.*; Report of the European Commission of Human Rights of 16 December 1982 in the Kröcher/Möller case, *in* DR 34, p. 24 *et seq.*

Extradition of individuals to countries in which they are liable to be tortured

92. In 1966 Switzerland ratified the European Convention on Extradition. On that occasion, the Federal Council pointed out that extradition to a country which ordered corporal punishment was not compatible with Swiss public policy, particularly article 65 of the Constitution.

93. This principle was embodied in the Federal Act on International Mutual Assistance in Criminal Matters, which has been in force since 1983 and which provides that extradition "shall not be granted unless the requesting State gives a guarantee that the person sought will not be executed or that he will not be subjected to treatment violating his physical integrity". Alongside article 3 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Federal Tribunal regards article 3 of the European Convention on Human Rights and article 3, paragraph 2, of the Convention on Extradition as binding rules of public international law and refuses to order extradition where there are grounds for believing that the physical or mental integrity of the person to be extradited is threatened in the requesting State.[39] Although it is true that extraditions that may embody such risks have been carried out, that has been the case only on the basis of a formal undertaking of the requesting State to guarantee respect for the rights of the individual. To date, only one country has failed to respect such an undertaking. If a new request for extradition were to be submitted by that country, it is likely that the request would not be granted.

Non-refoulement

94. Switzerland's policy on asylum takes account of the applicable principles of international customary and treaty law, particularly "non-refoulement". The Federal Asylum Act (dated 5 October 1979) was amended recently, on 22 June 1990. The amendments introduced specify, in particular, the conditions under which an asylum-seeker may not be sent back if his or her request has been rejected by the competent federal authorities. The recent legislative amendment establishes equality of treatment for all aliens who have to leave Switzerland. The amendment specifies that:

> Persons who cannot be considered as "refugees", within the meaning of the 1951 Convention relating to the Status of Refugees;
>
> Refugees who can no longer invoke grounds for non-refoulement under article 1 of the 1951 Convention;
>
> Aliens who have to leave Switzerland,

shall be returned only when return does not violate the principle of non-refoulement.

95. The Swiss authorities' practice on asylum also complies with the principles of the European Convention on Human Rights, particularly article 3 thereof. Each request for asylum triggers an examination of the personal situation of the asylum-seeker. Return to the country of origin occurs only when it can be established that the foreigner runs no personal and concrete risk.[40]

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[39] ATF 108 Ib 408 and 109 Ib 64.

[40] For a precise description of Swiss legislation and practice on asylum, see the two reports by Switzerland to the Committee against Torture (CAT/C/5/Add.17 and CAT/C/17/Add.12).

Medical experimentation

96. In general, no medical intervention may be carried out on a patient unless the patient has given free and informed consent thereto, which presupposes that the patient has been told by the physician of the nature and consequences of the intervention and has given prior agreement. This derives directly from personal freedom.[41] This principle is applicable *a fortiori* to medical research on man. Mention should be made here of the "Directives d'éthique médicale concernant la recherche expérimentale sur l'homme" (Directives on medical ethics concerning experimental research on man), as well as the "Directives pour l'organisation et l'activité des commissions d'éthique médicale chargées de l'examen des projets de recherche expérimentale sur l'homme" (Directives on the organization and work of commissions on medical ethics responsible for examining projects involving experimental research on man) (annexed), drawn up by the Swiss Academy of Medical Sciences (ASSM), which call for the subject's written consent. If the subject is incapable of discernment, the consent of the following must also be obtained: the trustee or guardian; a close family member, if the subject has no appointed legal representative and it can be assumed that he approves of this procedure. Finally, persons whose freedom is restricted by decision of an authority must have the opportunity to consult a legal adviser. They must, in all cases, give their consent in writing. Such consent may in no case be associated with any benefit.

97. The Swiss Academy of Medical Sciences is a private law foundation. Through the calibre of its work, it has acquired indisputable moral authority and its directives are regarded as "soft law" in Switzerland. In other words, they have no normative force, but the Federal Tribunal is guided by them, recognizing that they reflect the present level of science and meet the conditions laid down by constitutional principles.

98. In all cases, the subject's consent is limited by the rules of civil law protecting the individual against excessive pressure (article 27 of the Civil Code) and by the principles of criminal law whereby the consent of the subject may justify neither an attempt on his life nor, in principle, serious bodily injury.

Sexual mutilation

99. Sexual mutilation of a ritual nature, such as clitoral excision, constitutes serious bodily injury in Swiss criminal law and automatically gives rise to prosecution. Furthermore, such practices are considered to be inhuman treatment. Consequently, if a foreign woman expelled from Switzerland can validly indicate that she runs a real and definite risk of undergoing such treatment, the authority concerned shall not send her to the country concerned (see above, para. 92 *et seq.*).

Human rights teaching for those responsible for applying the law

100. The teaching of human rights, including the prohibition of torture, forms part of the training of prison staff, police and army personnel. Persons working in establishments where sentences are served receive basic and ongoing training at the Swiss Centre for the Training of Prison Staff. The Centre provides instruction on the European Convention on Human Rights, fundamental freedoms and constitutional law.

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[41] ATF 114 Ia 350. In this decision, the Federal Tribunal accepts certain restrictions to this principle, which must have sufficient legal basis and not go beyond the requirements of public interest. The legislator may therefore authorize a medical intervention on the human body, against the wishes of the patient, in exceptional cases in which the clearly established public interest so requires (control of epidemics or requirements of special civil or penal procedures).

101. Most police forces send their officers to the courses held by the Swiss Police Institute at Neuchâtel. This Institute provides instruction on the European Convention. Each Swiss soldier receives a manual and instruction courses on the Geneva Conventions. Instructors also take courses in public international law.

102. At the European level, Switzerland participated in the elaboration of the European Penitentiary Rules (recommendation (87) 3, adopted by the Committee of Ministers of the Council of Europe on 12 February 1987), which are the counterpart of the United Nations Standard Minimum Rules for the Treatment of Prisoners.[42] This recommendation has been translated into German and distributed to the cantons. Two other Council of Europe publications, one for the use of "persons responsible for police training policy, police instructors and officers", the other for prison governors, serve as guides in the elaboration of teaching programmes.

Article 8

103. The unwritten constitutional right to personal freedom and article 4 of the European Convention on Human Rights protect the individual against all forms of slavery or servitude. The relevant criminal law provisions are, in particular, those punishing coercion (art. 181 of the Penal Code) or kidnapping and abduction (art. 183 of the Penal Code). The Civil Codes and Code of Obligations protect the individual against excessive pressure (art. 27 of the Swiss Civil Code and arts. 20 and 21 of the Code of Obligations).

104. Moreover, Switzerland is party to the Slavery Convention, dated 25 September 1926, as amended by a protocol dated 7 December 1953, as well as the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, dated 7 September 1956. Mention should also be made of ILO Conventions No. 29 and No. 105, to which Switzerland is also party, on matters connected with the abolition of slavery and forced labour.

105. The question of conscientious objection and military service, as set out in article 8, paragraph 3 (c), of the Covenant, is dealt with in detail below in the chapter on article 18 of the Covenant. It should be noted that the Federal Tribunal was recently called upon to rule that civil defence service, in the same way as military service, is neither forced nor compulsory labour in the meaning of article 4 of the European Convention on Human Rights.[43]

106. In accordance with article 37 *et seq.* of the Penal Code, prisoners sentenced to ordinary or rigorous imprisonment are obliged to do the work assigned to them. To the extent possible, they will be assigned work appropriate to their aptitudes that will enable them to provide for their needs when they are released. The light imprisonment regime is somewhat different in that the prisoner may himself seek an appropriate occupation. In such cases, the obligation to work is for the purpose of social reintegration. According to the case-law of the Federal Tribunal on personal freedom, a person in detention pending trial may not be obliged to work.[44] With regard to conditional release, this may be subject to requirements regarding the prisoner's conduct, particularly occupational activities. In the view of the Swiss Government, these regulations are compatible with article 8, paragraph 3 (c), of the Covenant.

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[42] In its ongoing case-law, the Federal Tribunal has decided that its rulings should be based on the principles set out in the recommendations of the Council of Europe on the treatment of prisoners when interpreting and concretizing personal freedom and that no derogation therefrom is permissible without serious grounds. See, for example, ATF 111 Ia 341.

[43] ATF 118 Ia 341.

[44] ATF 97 I 51.

107. Finally, a citizen may be obliged, under threat of sanctions, to undertake service in the event of *force majeure* or in the case of a disaster threatening the national, cantonal or local community. Civic obligations sometimes entail such responsibilities (obligation to accept jury service, militia service in the fire brigade).[45]

108. The question of the traffic in women and children for prostitution is of serious concern to the Swiss authorities. The Penal Code, which was recently amended on this point, specifically punishes trafficking in human beings with rigorous or ordinary imprisonment (art. 196 of the Penal Code). The same applies to anyone who impels a person into prostitution by making use of a relationship of dependence, for the purpose of material benefit or in the case of a male or female juvenile (art. 195 of the Penal Code).

109. The application of these provisions is, however, not a solution to all problems that may occur in practice. A particular example of this is limited-term permits of sojourn (*permis de séjour*) for artistes that are improperly obtained for hostesses and nightclub girls ("go-go girls"). Article 13 (c) (3), of the Order of 6 October 1986 limiting the number of foreigners[46] allows for permits of sojourn for a maximum term of eight months per calendar year to be issued to foreigners wishing to carry on a paid activity as "cabaret dancers performing in musical and artistic shows", in addition to the quotas set for foreign workers. The Federal Aliens Office has issued directives to the cantonal police forces dealing with aliens to make it clear that this provision relates only to artistes presenting an artistic programme on the stage and not to persons employed merely to entertain customers (hostesses, nightclub girls, "go-go girls", etc.). In order to provide artistes with better protection, the Federal Aliens Office has laid down the following rules in its directives.

110. Any application by an employer must be accompanied by two copies of the job contract signed by the parties. In order to prevent abuse, the contract must necessarily comply with the clauses of the standard contract of the Swiss Association of Concert Cafés, Cabarets, Dancehalls and Discothèques, approved by the Federal Office for Industry, Arts and Crafts and Labour.[47] It is the responsibility of the employment agency, and not of the administration of the establishment, to ensure that any artiste for whom a contract has been drawn up in a language that is not the artiste's mother tongue is made aware of the clauses of the agreement and has understood them. In particular, the contract must mention the following points: the exact nature of the work (e.g. type of show, number of stage appearances, etc.); hours of work and time off; agreed gross wage, detailing all deductions (taxes, social security contributions, commission to the employment agency and any other deduction from the wage packet); travel costs; accommodation arrangements.[48] Moreover, the cantonal authorities must check that the clauses of the contract are respected, that the staff of the establishment have the necessary permits and that the work corresponds to that indicated in the job contract.

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[45] Decision of the Federal Tribunal dated 10 October 1986, *in* ZBl. 88/1987, p. 306.

[46] This Order, as well as the legislation on the status of foreigners, is described below with reference to article 12 of the Covenant.

[47] A copy of this standard contract is annexed to this report.

[48] This standard contract is designed to ensure that no male or female foreign artiste is enticed to Switzerland by the prospect of an attractive wage of which he or she will only receive a small part, after deduction of the cost of accommodation, travel, food, etc., which could lead to a situation in which the individual feels obliged to turn to prostitution.

111. This is a sensitive area, for which there is no miracle solution. The competent federal and cantonal authorities therefore reserve the possibility of adopting additional measures; if the need arises, the current legislation could be amended.

112. The diplomatic missions of Switzerland abroad have also been instructed to ensure that an artiste who requires a visa applies for the visa in person at the Swiss mission competent in relation to his or her legal domicile.

113. The Swiss Government is also endeavouring to control "sex tourism" to developing countries and, to a lesser extent, Central and Eastern Europe. A working group on the traffic in women, sex tourism and prostitution, under the aegis of the Federal Office of Equality between Men and Women, bringing together representatives of the offices involved and experts from private organizations, is undertaking a wide-ranging information campaign on this subject. A brochure dealing with the causes and consequences of sex tourism, for the information of tourists travelling from Switzerland, was produced in 1991. Parliament gave the Federal Council the task of studying an amendment to the Penal Code to make it possible to initiate the criminal prosecution of persons residing in Switzerland who have committed sexual acts with children or have been involved in the traffic in children, even if the offences are not punishable in the countries in which they were committed.

114. Although the Swiss authorities know of no case, on Swiss territory, of children who have been victims of trafficking for the purpose of organ transplantation, they are keeping a close watch on developments in this field, in Switzerland and around the world. The ratification of the Convention on the Rights of the Child, of 20 November 1989, will give Switzerland an additional tool in the fight to control the removal of organs from children.

Article 9

Paragraph 1

General

115. It may be useful to recall that, under article 64 *bis*, paragraph 2, of the Federal Constitution, the cantons are competent in matters of legal organization and of civil, penal and administrative procedure. Article 343 of the Penal Code merely acknowledges this constitutional competence of the cantonal authorities to prosecute and adjudicate, "in accordance with the procedural conditions of cantonal law, offences envisaged by the present Code". Each of the 26 cantons therefore has its own legislation on penal procedure and with regard to policing. Federal constitutional case-law regarding fundamental freedoms nevertheless sets out principles and requires the cantons to comply therewith. In spite of the large number of different penal, civil and administrative procedures, this report will attempt to summarize the solutions adopted by the cantons in the areas of application of the Covenant.

116. Liberty and security of person are guaranteed, in the Swiss legal system, by the unwritten constitutional right to personal freedom, which is expressly protected by the wording of the 1874 Federal Constitution only in certain areas, by prohibitions on imprisonment for debt (art. 59, para. 3), sentences of death for political crimes (art. 65, para. 1) and corporal punishment (art. 65, para. 2). According to case-law, personal freedom is part of the unwritten constitutional law of the Confederation, because it is a prerequisite of all other freedoms and is therefore an essential element of Swiss public order.[49]

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[49] For example, ATF 89 I 98.

The possibility of assessing a given situation and deciding thereon is also a condition for the exercise of many constitutional rights, and the mental integrity of the human being is also protected by personal freedom.[50] This is an imprescriptible and inalienable fundamental human right, applicable to all Swiss and foreign individuals. It may be restricted only on the grounds indicated in legislation (see below) and in compliance with the relevant procedures. Minors who are capable of discernment and persons suffering from judicial disability may, independently, invoke their personal freedom by means of a public law remedy.[51]

117. To the extent that it concerns the guarantee of liberty and security of person and the prohibition of arbitrary arrest (freedom of movement), the guarantee of personal liberty is supplemented by article 5 of the European Convention on Human Rights.

Types of detention

118. Article 5, paragraph 1, of the European Convention on Human Rights gives an exhaustive enumeration of the cases in which an individual may be deprived of liberty. The European Convention is an integral part of the Swiss legal order and the Federal Tribunal applies this enumeration, as well as the jurisprudence of the organs of the Convention, when giving practical implementation to the unwritten constitution right.[52] Like article 9 of the Covenant, article 5 of the European Convention is applicable to all forms of detention, regardless of the grounds therefor. This applies equally to disciplinary arrest pursuant to the Military Penal Code.[53] Some cantonal laws of penal procedure also provide for short-term detention as a penalty for refusal to testify in a case (coercive arrest). This approach complies in principle with article 5 of the European Convention, but a cantonal law that envisages systematic use of such arrest in any criminal case and in respect of any recalcitrant witness is, in this general form, contrary to the right to personal freedom.[54]

119. It has been ruled that arrest by the police (or police custody), for a period of four to six hours, for the purpose of identification, certainly constitutes a restriction on personal freedom, but not deprivation of liberty in the sense of article 5 of the European Convention on Human Rights.[55] However, detention in a cell for four hours does constitute deprivation of liberty.[56]

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[50] ATF 90 I 36.

[51] ATF 65 I 268.

[52] ATF 108 Ia 67; 105 Ia 29.

[53] *Feuille fédérale* 1977 I 1138 *et seq.*, case of Eggs v. Switzerland, report of the European Commission on Human Rights, 4 March 1978, DR 15, p. 35.

[54] ATF 98 Ia 424.

[55] ATF 107 Ia 140. The same applies when a person is taken to a police station for an identity check or search.

[56] ATF 113 Ia 178.

120. The Federal Act of 20 March 1981 on International Mutual Assistance in Criminal Matters[57] provides that any foreigner may be arrested for the purpose of extradition, either by virtue of an application by a national central office of Interpol or the Ministry of Justice of another State, or by virtue of an international appeal based on a list of wanted persons (art. 44 of the Act). A warrant of arrest is issued by the Federal Police Office. The Office may decide against arrest, particularly if it seems that the person in question will not attempt to evade extradition and will not hinder the investigation or if an alibi can be provided without delay (art. 47). The Federal Office may also replace arrest by other measures if the person in question cannot undergo incarceration or if there are other grounds (art. 47, para. 2). The period of arrest is limited to 18 days (40 days if there are special reasons). The person is detained during the extradition procedure if the documents filed in support of the application do not indicate that this is clearly inadmissible (art. 51 of the law). The person involved may apply for release at any time (art. 50).

121. In chapter VI concerning deprivation of liberty for assistance purposes, the Swiss Civil Code sets out that a "person of full age or under legal disability may be placed or retained in a suitable institution when, because of mental illness or feeble-mindedness, alcoholism, drug addiction or a serious state of neglect, personal assistance cannot be provided to that person in any other manner".

122. Placement in an appropriate establishment, which lies within the powers of the canton, requires prior psychiatric examination (except in emergencies and only in the case of mental illness, cf. art. 397e, numbered para. 5 of the Civil Code), which must clearly show the need for such a measure.[58] There must be a fresh examination if the period of confinement is to be extended.[59]

123. The legislation on the sojourn and establishment of foreigners and that on asylum envisage two forms of loss of liberty: detention for the purpose of return or expulsion (article 14 of the Federal Act of 26 March 1931 on the Residence and Establishment of Foreigners (henceforth LSEE)), and internment (art. 14d of the LSEE — but see para. 125 below).

124. Detention may be ordered if the return or expulsion of an alien is unforceable and if there are serious grounds to believe that the alien intends to evade being sent back. This measure is taken by the cantonal aliens police authorities, for a maximum period of 48 hours. It may be extended only on the order of a judicial authority. In no case may it exceed 30 days.

125. Internment, which used to be implemented when return or expulsion is neither possible nor reasonably applicable (art. 14a of the LSEE), and the foreigner represents a grave threat to the security of the country or a canton, or seriously jeopardizes public order, by his or her presence, was abolished as from 1 February 1995. The legislation on aliens police and asylum matters has recently been amended, with particular reference to questions of deprivation of liberty. A federal law on coercive measures in aliens police matters was approved by popular vote on 4 December 1994 and came into effect on 1 February 1995. The content and scope of this new law will be described during the oral presentation of this report.

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[57] RS 351.1.

[58] ATF 106 Ia 33.

[59] Ruling of the Vaud Cantonal Tribunal, in JdT 1987 III 115.

Paragraph 2

126. Most of the cantonal laws of procedure lay down that the person arrested must, at the time of his arrest, be presented with a written warrant of arrest setting out the facts of the case and the grounds for arrest (art. 46 of the PPF; art. 108 of the Uri CPP; art. 27 of the Schwyz CPP; art. 62 of the Obwalden CPP; art. 59 of the Nidwalden CPP; art. 11 of the Fribourg CPP; art. 43 of the Solothurn CPP; art. 55 of the Basel-Town CPP; art. 29 of the Basel-Country CPP; art. 153 *et seq*. of the Schaffhausen CPP; art. 99 of the Appenzell Rhode-Extérieur CPP; art. 93 of the Saint Gallen CPP; art. 83 of the Graubünden CPP; art. 69 of the Aargau CPP; art. 117 of the Thurgau CPP; art. 35 of the Ticino CPP; art. 67 of the Valais CPP; art. 36 of the Geneva CPP). There are special arrangements for cases of *flagrante delicto*, in which the warrant may be issued subsequently. Other cantons, such as Zurich, Lucerne, Glarus, Zug, Appenzell, Inner-Rhoden and Neuchâtel, make provision for the arrested person to be given the necessary information when first questioned. Others make provision for notification of the offence on arrest, followed by an indication of the grounds for arrest at the first questioning (Bern, Vaud and the Jura).

127. The Federal Council, in taking a position the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, stressed that: "Any person arrested by the police has the right, following in particular from the personal freedom guaranteed by the Federal Constitution and article 8 of the European Convention on Human Rights, to inform his near relations or third parties of his arrest without delay. The arrested person should be immediately informed of his right. Exceptions to this principle should be clearly determined and the grounds for exceptional decisions should be indicated. When there is no danger of collusion, the person in police custody generally has the right to contact a near relation or even a third party."[60]

128. However, in general there are no express provisions in cantonal law to enable a person arrested under the conditions mentioned above to inform a near relative or a third party of his arrest or to contact a lawyer. The right of access to a lawyer is, in principle, guaranteed only after the arrested person has appeared before a magistrate for the first time.[61] Access is then free, apart from restrictions that may be justified for the purposes of the investigation and specifically indicated in cantonal law. The right to notify near relatives is also expressly covered only after provisional detention has been imposed and, in principle, it is the examining magistrate who informs the person's near relatives.[62]

129. Although, in spite of the absence of express provisions on this subject, in practice the arrested person is given the right to notify his near relatives immediately, the Federal Council has stated, in its position mentioned above, that it would be paradoxical to authorize the assistance of a lawyer right from the beginning of the period of police custody, for the initial police questioning, whereas cantonal procedures exclude this subsequently until the end of the first hearing before a magistrate. According to the Federal Council, this exclusion is in conformity with the Constitution and the case-law of the organs of the European Convention.[63]

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[60] "*Prise de position du Conseil fédéral suisse relative an rapport du CPT, établi suite à sa visite effectuée en Suisse du 21 au 29 juillet 1991*" (Position of the Swiss Federal Council on the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, prepared following the visit it made to Switzerland from 21 to 29 July 1991), annexed, p. 10.

[61] Between 24 and 48 hours after arrest.

[62] For example, art. 115 of the Bern CPP, art. 63 of the Zurich CPP and art. 128 of the Vaud CPP.

Paragraph 3

130. In general, pre-trial detention may be ordered only if there are strong reasons to suspect that the individual has committed a punishable act and that there is a danger of flight or collusion.[64] Some cantons also provide for detention on the grounds that there is a danger of repetition of the offence. In examining the grounds for thinking that the arrested person will commit other offences, very strict conditions must be satisfied because detention on the basis of the danger of repetition of the offence entails risks of abuse.[65]

131. The case-law of the Federal Tribunal is fairly strict with regard to pre-trial detention on the grounds of the risk of flight. In particular, it has set out the following principles:

> The seriousness of the penalty may be indicative of the risk of flight, but it cannot be the only ground for detention which must be based on concrete circumstances pertaining to the case in point, particularly the behaviour of the individual and the individual's material situation (personality, contacts in the country and abroad, occupational situation, etc.);[66]
>
> To prevent the risk of flight, recourse must be had in the first instance to measures less severe than detention, such as the obligation to report to the authorities at regular intervals;[67]
>
> The possibility of release on bail must reflect the principle of proportionality and the amount of bail must not be prohibitive, preferably taking account of the financial resources of the individual and his near relations;[68]
>
> The bail must guarantee the individual's appearance and must not be in the nature of an additional penalty.[69] These principles are generally embodied in cantonal law. Reference could be made, by way of example, to articles 53 *et seq.* of the Federal Law of Penal Procedure, dated 15 June 1934, which deals with release on bail.

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[63] "*Prise de position du Conseil fédéral suisse relative au rapport du CPT, établi suite à sa visite effectuée en Suisse du 21 au 29 juillet 1991*", annexed, p. 10/11, No. 40.

[64] ATF 102 Ia 304.

[65] ATF 105 Ia 30.

[66] ATF 117 Ia 70, 108 Ia 67, A. Haefliger, "*Die Europäische Menschenrechtskonvention und die Schweiz*", (The European Convention on Human Rights and Switzerland), Bern, Stämpfli, 1993, p. 90.

[67] ATF 117 Ia 70.

[68] 105 Ia 187.

[69] RSDIE 1982, p. 170.

132. In accordance with article 5, paragraph 3, of the European Convention on Human Rights, the cantonal Codes of Penal Procedure envisage that the person arrested must be heard by the competent authority[70] within a period that varies from 24 to 48 hours, as from the time of arrest (article 47 of the PPF provides that the hearing should take place "at the latest on the first working day following the day on which he [the prisoner] is brought in"). It has been ruled that this right to be brought before the authority without delay applies only on arrest and not in the event of a decision to extend pre-trial detention.[71] The competent authority must have the power to release the prisoner, on bail if applicable, or to keep the prisoner in detention, indicating the grounds therefor. The individual concerned may make application for release to the magistrate dealing with the case, with the possibility of recourse (see, for example, articles 47 *et seq.* of the PPF and below para. 135).

133. Any prisoner placed in pre-trial detention has, according to article 5 of the European Convention and article 9 of the Covenant, the right to be tried in a reasonable time or to be released. It is sometimes difficult, in practice, to assess what is reasonable with regard to the period of pre-trial detention. The laws of penal procedure generally require the release of the prisoner "immediately detention is no longer justified" (see, for example, article 50 of the PPF). The prisoner's interest in regaining freedom and the public interest in the effectiveness of the procedure are to be balanced. The particular circumstances of each case play a preponderant role here. In order to decide whether preventive detention has exceeded a reasonable period, account must be taken of the difficulty of the investigation, the way in which the examination has been conducted and the attitude of the individual concerned.[72] These criteria may lead to relatively long periods of detention being considered reasonable. Thus, in two cases concerning Switzerland that date back some time, the European Commission on Human Rights, having regard to the complexity of the cases, the number of recourse procedures initiated by the interested parties (no less than 17 in one case) and the diligence of the examining authorities, accepted that detention periods of 30 and 34 months respectively were not excessive.[73] Very recently, the European Court of Human Rights arrived at the same conclusion regarding a detention period of four years and three days in a case concerning extremely complicated economic offences. With regard to the quite exceptional conduct of these proceedings, the Court noted, in particular, that: "the particular speed with which an accused prisoner has the right to examination of his case must not jeopardize the efforts of the magistrates to fulfil their task with the necessary thoroughness. The Court sees no period in which the investigators failed to carry out the investigation with the necessary promptness, or any slowing down owing to any lack of staff or equipment. Consequently, the length of the detention period is attributable, essentially, to the exceptional complexity of the case and the behaviour of the plaintiff. Clearly he was not obliged to cooperate with the authorities, but he must put up with the consequences that his attitude may have had on progress in the investigation."[74]

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[70] In other words "a judge or other officer authorised by law to exercise judicial power", in the sense of article 5, paragraph 3, of the Convention, i.e. an impartial and independent magistrate, ruling according to a judicial procedure. A. Haefliger, op. cit., p. 93. RSDIE 1990, p. 199; 1989, p. 273. This means that a hearing by a police official is not sufficient: ATF 102 Ia 385.

[71] Decision of the Federal Tribunal of 30 January 1990, *in* RSDIE 1990, p. 197.

[72] ATF 107 Ia 256.

[73] Case of Bonnechaux v. Switzerland, report of the European Commission on Human Rights dated 5 December 1979, DR 18, p. 100; Schertenleib case, report of 11 December 1980, DR 23, p. 137.

[74] European Court of Human Rights, case of W. v. Switzerland, ruling of 26 January 1993, Series A 254. There were valid grounds for this period of detention because of the risk of collusion and the danger of flight.

134. The Federal Tribunal applies a last criterion in examining the length of a period of pre-trial detention: according to its case-law, even when no criticism of slowness can be levelled at the examining authorities, detention for a period close to that of the penalty probably incurred by the individual concerned cannot be considered reasonable.[75]

Paragraph 4

135. In penal matters, the possibility of recourse against detention or arrest is provided for in all cantonal procedures. Most cantons provide for direct recourse to a court.[76] Some procedures do, however, have a system whereby the prisoner must first appeal to the authority that ordered the measure and then, if this appeal is rejected, initiate recourse to the court (Basel-Country, Saint Gallen and Thurgau). Finally, some cantons, as well as the Confederation (art. 47, para. 1, of the PPF), have a judge with special responsibility for dealing with such recourse (*Haftrichter*). Recourse may also be initiated against any ruling that extends the period of pre-trial detention,[77] and in cases of reincarceration after release. Mention should also be made of the Federal Act on International Mutual Assistance in Criminal Matters, which provides for recourse to the Chamber of Accusation of the Federal Tribunal in respect of any arrest for the purpose of extradition, within 10 days of the arrest.

136. In civil matters, deprivation of liberty for assistance purposes, pursuant to the Civil Code, must be implemented in compliance with the following rules (arts. 397a to 397f of the Civil Code):

> The person in question or a near relative may appeal in writing to the judge, within 10 days following the communication of the decision to impose internment (or an extension thereto) by the competent authorities (in principle the supervisory authorities). The person must be informed of the grounds for the decision and of his right to appeal to the judge. This information must be reiterated when he enters the establishment or when an application for release is rejected;
>
> The application for a judicial ruling must be transmitted immediately to the competent judge, who is to rule according to the cantonal procedure, which must be simple and rapid and include the hearing of the individual in first instance;[78]
>
> If necessary, the judge is to grant the person concerned legal assistance;

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[75] ATF 107 Ia 256; 116 Ia 147.

[76] Bern (art. 128); Lucerne (art. 81); Uri (art. 117); Schwyz (art. 28); Obwalden (arts. 62 and 70); Nidwalden (art. 163 *et seq.*); Glarus (art. 57); Zug (art. 80); Fribourg (art. 29); Solothurn (art. 206); Basel-Town (art. 73 *et seq.*); Schaffhausen (arts. 159 and 161); Appenzell Ausser-Rhoden (art. 108); Appenzell Inner-Rhoden (art. 58); Graubünden (art. 138); Aargau (art. 76); Ticino (art. 226 *et seq.*); Vaud (art. 295); Valais (arts. 72 and 166 *et seq.*); Neuchâtel (art. 233); Geneva (art. 156 *et seq.*); the Jura (art. 129). See also article 52 of the PPF.

[77] ATF 105 Ia 41.

[78] This hearing need not be public: ATF 114 Ia 182.

Moreover, the person concerned must be released, regardless of any petition, as soon as the person's condition permits (art. 397a of the Civil Code).[79]

137. With reference to aliens police and asylum matters and according to cantonal legislation, there is the possibility of recourse against detention for the purpose of return or expulsion. The final instance is the Federal Tribunal, which rules on the case when the conditions for an administrative law remedy are fulfilled. With reference to internment, an administrative law remedy must be filed with the Federal Tribunal.

138. Pursuant to article 9, paragraph 4, of the Covenant, the court called on to deal with recourse against detention or an application for release must rule without delay. The European Court of Human Rights and, following it, the Federal Tribunal consider that, depending on the circumstances of the case in point and in straightforward cases, periods of 46, 41, 30 or even 15 days do not comply with this requirement.[80]

Paragraph 5

139. Anyone who has been a victim of unlawful arrest has the right to compensation, by virtue of article 5 of the European Convention on Human Rights. This does not, however, apply to an individual who, after having been suspected of the commission of a serious crime and then proved innocent by the investigation, has been legally placed in pre-trial detention (for example because of the risk of flight).[81] However, virtually all cantons provide for a form of compensation in these cases too,[82] which brings Swiss law into line with article 9, paragraph 5, of the Covenant, even though the guarantees in that provision must be interpreted as going beyond those of article 5 of the European Convention. Article 15 of the Federal Act on International Mutual Assistance in Criminal Matters envisages compensation, according to cantonal or federal law, for all unjustified detention in the course of a procedure taking place in Switzerland in accordance with this law or elsewhere at the petition of a Swiss authority.

140. Before an individual may seek reparation for material damage (loss of income, procedural costs), as well as moral damage, the amount in question must be fairly substantial, which will nearly always be the case in the event of unlawful or unjustified detention. The Federal Tribunal has, however, ruled that detention lasting four hours does not give entitlement to compensation for undemonstrated material damage.[83]

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[79] An example of cantonal legislation regarding deprivation of liberty for assistance purposes is given in P.C. Weber, "*La loi genevoise sur le régime des personnes atteintes d'affections mentales et sur la surveillance des établissements psychiatriques, du 7 décembre 1979*" (The Geneva law on persons suffering from mental illness and the supervision of psychiatric establishments, dated 7 December 1979).

[80] European Court of Human Rights, case of Sanchez-Reisse v. Switzerland, ruling of 21 October 1986, Series A 107. ATF 114 Ia 88; 117 Ia 375. A. Haefliger, op. cit, p. 109.

[81] ATF 105 Ia 131.

[82] ATF 110 Ia 142. See, for example, article 67 of the Vaud CPP.

[83] ATF 113 Ia 182. On the other hand, compensation for moral damage was granted in this case.

141. Following the example of other countries, Swiss case-law allows for the rejection of any compensation when the victim has culpably provoked his arrest or his detention.[84] It should be noted that refusal to answer the investigator's questions is not normally considered to be culpable behaviour.

Article 10

Paragraphs 1 and 3

General

142. Because of Switzerland's federalist system, the execution of custodial sentences and measures falls within the competence of the cantons. Accordingly, each of the 26 cantons has its own authority responsible for the execution of punishments based on civil and criminal law alike.[85] The following paragraphs, which refer to the requirements set forth in paragraphs 1 and 3 of article 10 of the Covenant, will attempt to describe the different custodial regimes applicable in Switzerland and to give an idea of the way in which persons deprived of their liberty are ensured humane treatment showing respect for their dignity.

Deprivation of liberty based on the Penal Code

143. It is only since 1942 that Switzerland has had a unified penal code for the entire country. Although criminal procedure and the execution of punishments fall in the first instance within the competence of the cantons, the Swiss Penal Code of 21 December 1937 and the orders attached to it also contain framework provisions regarding the execution of punishments, in particular the aims and functions of such execution, the different penalties imposable, the different types of institution within the penitentiary system and the main methods and means employed. The Confederation also exercises a right to overall supervision of the execution of punishments entitling it to examine, at its own initiative, measures adopted by the cantons and to intervene where substantial public interests are infringed or threatened by incorrect application of federal law (art. 392 of the Penal Code). Such supervision is additional to the right of detainees to appeal to the Federal Tribunal against a cantonal decision of last instance. Finally, the Confederation exerts direct influence on the enforcement of punishments by granting subsidies, whether for the construction or renovation of adult prisons or juvenile facilities, for their operation, or for pilot projects in that sphere.

144. The Swiss Penal Code provides for three types of custodial sentence: light imprisonment, ordinary imprisonment and rigorous imprisonment (third title, first chapter, art. 35 *et seq*. of the Penal Code). Light imprisonment ranges from at least one day to a maximum term of three months, ordinary imprisonment from three days to three years in principle and rigorous imprisonment from one year to 20 years; in some cases, however, a life sentence may be awarded in the case of rigorous imprisonment. The judge may suspend sentences of up to 18 months.

145. The execution of a sentence of rigorous imprisonment does not, in practice, differ in any way from an ordinary sentence. Light imprisonment, however, may not be accompanied by other custodial sentences or measures. A prisoner serving a sentence of light imprisonment also has the privilege of being able to obtain work himself.[86]

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[84] For example, by remaining silent concerning an alibi that would have permitted his immediate release. For other details on the concept of culpable behaviour eliminating the right to compensation, see ATF 112 Ib 446.

[85] The other grounds for deprivation of liberty described above with reference to article 9 of the Covenant (pre-trial detention or internment of aliens) are not dealt with explicitly here. They are, however, subject to the general regime described in the present chapter.

146. Under certain conditions the judge may decide in his verdict to suspend the sentence and impose in its place a sentence whose length is not predetermined. With respect to adult offenders, the Swiss Penal Code provides for the following measures: treatment of abnormal offenders, alcoholics and drug addicts; detention of habitual offenders (third title, first chapter, art. 42 *et seq.* of the Penal Code), and labour training for young adults (from 18 to 25 years of age; fifth title, art. 100 *bis et seq.*).

147. Measures relating to abnormal delinquents, alcoholics and drug addicts (arts. 43 and 44 of the Penal Code) are, to simplify matters somewhat, always imposed when the convicted offender is shown as a result of medical examination to be both in need of treatment and able to receive it. The following conditions also have to be fulfilled: the offence has to be directly or indirectly attributable to the abnormality and the offender's alcoholism or drug addiction has to be of a certain degree of seriousness.

148. The competent authority examines at its own initiative whether and when conditional release or release on parole should be awarded. It is also required to examine at least once a year whether an offender should be released from an institution for abnormal offenders, alcoholics or drug addicts, as defined by articles 43 and 44 of the Penal Code (art. 45, chap. 1, of the Civil Code). At all events, measures of the kind in question should be suspended as soon as their cause is no longer present. The judge then decides whether and to what extent the original sentence should still be executed, something that tends not to happen in practice. Sentences are generally served in special institutions for alcoholics or drug addicts or in psychiatric clinics, in other words, public or private institutions primarily intended for treating non-offenders. In exceptional cases, such sentences may also be served in a penitentiary institution and, in certain individual cases, the judge may even order out-patient treatment, which may or may not suspend the sentence.

149. The detention of habitual offenders, as provided by article 42 of the Penal Code, is intended first and foremost as a protective measure. The length of detention in such cases is, without exception, at least two thirds of the sentence awarded and a minimum of three years in any case. Once these terms have been served, the sentence may be lifted, provided a favourable prognosis can be made. In the case of a recommittal, the new term of imprisonment awarded is generally at least five years and is normally served in an institute for reoffenders.

150. Offenders aged between 18 and 25 have the possibility of benefiting from a special measure, namely labour training (art. 100 *et seq.* of the Penal Code). This measure lasts a minimum of one year and a maximum of four and is awarded in the case of young adults who, although disturbed in terms of personality development, are none the less capable of being re-educated. This measure is executed exclusively in labour training establishments separate from other penitentiary institutions. Alongside vocational training, the aim is to achieve all-round personality development, which calls for socio-educational and therapeutic methods.

151. Switzerland has five labour training establishments for young adults with a total of around 195 places. Two of these institutions have a closed ward, actually run as a closed ward in one case, but in principle they are just as open as the custody centres for minors.[87]

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[86] Cf. comments above on article 8 of the Covenant.

[87] For the custodial conditions applicable to minors, see below.

152. The cantons are required under federal law to ensure that they have institutions which meet the requirements of the law in terms of the penalties or measures to be executed in such institutions (art. 382 *et seq*. of the Penal Code). Private institutions are authorized to take offenders in the case of certain special measures (art. 384 of the Code). With respect to women's facilities and those of the Italian-speaking canton of Ticino, the Federal Council may allow exceptions to the principle of the separation of the different institutions (art. 397 *bis*, paras. 2 and 3, of the Code). As the situation stands at present, the Federal Council has issued provisions specifying exceptions — for women's facilities only — to the principle of separation of institutions enshrined in articles 37, 39, 42 and 100 *bis* of the Penal Code. The exceptions in question are subject to certain conditions and to the approval of the Federal Department of Justice and Police (art. 1 of Order 2 of the Swiss Penal Code).

153. Thus, Switzerland has over 100 detention centres which are usually connected to a remand facility and seldom have more than 50 places. Institutions of this kind provide a total of around 3,000 places for prisoners serving short sentences and persons held in pre-trial detention. As far as possible, they provide one-bed cells with running water and toilets, the larger institutions also having a number of cells with two or three beds.

154. For sentences to be served by first offenders, i.e. those with no convictions during the previous five years, there are 10 institutions providing a total of around 1,200 places. These facilities are generally operated as open or semi-open prisons. The ratio of full-time prison staff to inmates is approximately one to two or three.[88] Around six institutions are reserved for reoffenders and accommodate approximately 1,500 prisoners. These are closed prisons and have a staff:inmate ratio of approximately one to two. Lastly, there are five facilities with more open conditions designed to prepare prisoners for release (end-of-sentence regime), the prisoners generally working outside the prison. These facilities each have 10 to 40 places.

155. Under article 37 of the Penal Code, "rigorous and ordinary imprisonment shall be executed in such a way as to have an educational effect on the prisoner and prepare him for his return to freedom". The most important means available for achieving this end are described below. It should be added, however, that such measures are only partly applicable to short sentences.

156. **Phased system**. The prisoner progresses through several phases in his sentence which allow him ever increasing freedom. The first phase is that of confinement to his cell. This is seldom enforced in practice and generally lasts no longer than a few hours or several days, or perhaps several weeks in extremely rare cases. During this period, the aim of which is to prepare the prisoner for his sentence, he has no contact with other prisoners but lives and works in his cell. During the second phase, that of collective detention, which might last until the end of the sentence, he will only spend his resting time and a part of his leisure time in the cell. Work, leisure and meal-times are spent communally. During this phase, the prisoner may be permitted in some cases to engage in an activity or attend a course outside the institution. The third phase is that of semi-freedom in an end-of-sentence facility and normally begins half-way through the sentence. Lastly, release on parole may be granted two thirds of the way through the sentence.

157. Post-release aftercare (art. 379 of the Penal Code) is provided by the services responsible for supervising released prisoners, whose function it is to monitor the progress of the prisoner after release. These services may be public or private. They come into operation as soon as the prisoner is committed and have complete freedom to visit the prisoner from the time of pre-trial detention right through to release.

158. **Normalization**. This is the central concept of penitentiary policy and refers to the adaptation of daily prison life to life outside prison through the introduction of real-life demands. The minimum result sought is that the prisoner should not be any less capable of living in society after release than at the time of committal.

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[88] The figures given for staff include all personnel, not only those assigned to the care of prisoners.

159. **Work**. Given the fundamental importance of the world of work for the social integration of any citizen, work represents a central pillar of penitentiary policy in Switzerland. The Penal Code provides that work assigned to a prisoner is compulsory: "As far as possible, he will be assigned work corresponding to his abilities and enabling him, once he is released, to provide for his own maintenance". All medium- and long-term prison institutions, therefore, have workshops — as far as possible — with modern equipment where prisoners can serve apprenticeships. These workshops charge normal rates and have a primarily private clientele. If their work and behaviour are satisfactory, prisoners receive a wage which can be as much as 30 francs or so per day. In principle, prisoners have free use of a third of this amount, a third being deposited in a purchasing account (for use on leave or for courses) and the last third being blocked to be paid to the prisoner on release.

160. **Therapy and social training**. The different institutions designed for prisoners serving medium-length and long sentences differ from each other greatly in this regard. However, they all offer programmes whose application and content are established on a case-by-case basis with the agreement of the prisoner. Psychiatrists and/or psychologists are available to all such institutions.

161. **Contacts with the outside world**. In Switzerland, the importance of the prisoner's maintaining contacts with the world outside prison is taken to be self-evident. Particular attention is given to prisoners' relationships with their families and friends. Limits do, however, have to be placed on these contacts in the interests of enforcing the punishment, maintaining order and fulfilling security requirements. Thus, for example, the high-security and disciplinary regimes entail considerable restrictions of the prisoner's contacts: under these regimes, the prisoner spends 23 hours in his cell where he also works, his contacts with the outside world (visits, newspapers, mail) may be restricted and, whenever he goes outside for his daily walk or for other reasons, he is accompanied by several guards. The prisoner has various remedies against a decision to place him in isolation or under a high-security regime, the final recourse being the Federal Tribunal.

162. Prisoners are entitled to regular visits. These are granted by the competent cantonal authority at a frequency stipulated in the regulations of the particular institution and require written authorization. Visits by a prisoner's defence counsel can be made freely if so agreed by the competent authority. Prison administrations try to bring the outside world into prison life as much as possible through sporting events, theatrical productions bringing together actors and prisoners, and so forth. The most important form of contact with the outside world, and also the most controversial, is the granting of leave. Two types of leave may be granted: circumstantial leave (for baptisms, funerals, for reasons of health or for vocational purposes, etc.) and family leave. The latter is conditional upon good behaviour, satisfactory work and the expectation that the prisoner will not abuse the privilege. A prisoner serving a first sentence must have served at least one sixth of the sentence and have spent at least two months in the institution in order to obtain leave (these periods being one third and three months respectively for reoffenders). A maximum of 54 hours of leave may be granted every two months. According to the statistics available, only 1 to 2 per cent of prisoners fail to return to the institution within these periods. However, the fact that offences are occasionally committed during leave is a matter of concern to the public, especially when the offences in question are serious, and has provoked calls for tighter controls.

163. On the basis of previous decisions taken by the Federal Tribunal regarding respect for personal freedom in prison, it is possible to discern certain general principles. Thus, for example, the Federal Tribunal has ruled that persons who have been held in pre-trial detention for over a month have an extended right to

receive visits from their closest family members[89] and that the right to a minimum opportunity to take exercise (one hour's walk per day in the open air after one month of detention and, before that, at least half an hour) may not be linked to an arrangement for early release.[90] In more general terms, in the process of examining the constitutionality of prison regulations, the Federal Tribunal has had occasion to recall that a sentence of imprisonment must have a legal basis, be in the public interest and observe the principle of proportionality; that once committed, prisoners are subject to restrictions corresponding to the severity of the penalty imposed upon them (deprivation of liberty, disciplinary regime, etc.), but that, nevertheless, these restrictions must not go beyond what is necessary for attaining the objective of imprisonment or exceed reasonable demands from the point of view of ensuring the normal operation of the detention facility, and that they must respect the principle of proportionality.[91]

164. With regard to the sets of minimum rules for the treatment of prisoners adopted by the United Nations and the Council of Europe,[92] it emerges from federal case-law that, although these texts do not have a legally binding character, they none the less establish guidelines for prison policy to be taken into consideration when interpreting the constitutional right to personal liberty.[93]

165. Despite the desire to give detention a human character conducive to social reintegration, the execution of prison sentences, in Switzerland as elsewhere, is not without its problems. The situation is exacerbated by the constant increase in the number of persons detained, which has sometimes necessitated some unsatisfactory adaptations (conversions of day-rooms into cells, temporary buildings, etc.).

166. The number of foreign prisoners has also increased considerably over the past 10 years. At present, some 45 per cent of prisoners are foreigners and in some institutions over 40 nationalities are represented. This increase is not attributable to a growth in crimes committed by foreigners settled in Switzerland but to the increased number of arrests of foreigners entering the country for the express purpose of committing offences. It goes without saying that such prisoners present a host of problems relating to security and interfere with a reintegration-oriented policy of sentence enforcement.

167. A further significant problem is that presented by the large increase in the number of drug-addicted prisoners (almost one in three). When such prisoners refuse treatment in a rehabilitation centre, the judge is unable to impose any suitable penalty and the offender is therefore sent to a prison institution. Such prisoners present security problems and make it necessary to carry out systematic checks to prevent drug trafficking inside prison. Lastly, their physical and mental state is often such that drug addicts cannot be assigned work in the same way as other prisoners or involved in the leisure activities arranged by the prison.

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[89] A visiting right limited to 20 minutes per week is insufficient: ATF 106 Ia 136.

[90] ATF 105 Ia 26.

[91] See, for example, ATF 106 Ia 277; 116 Ia 421; 118 Ia 64. In these decisions, the Federal Tribunal focused on the constitutionality of specific points of prison regulations relating to permission to have personal belongings in the cells, presents from third persons, walks and physical exercise, written correspondence and the possibility of having radio sets in the cells, etc.

[92] Cf. in particular: Standard Minimum Rules for the Treatment of Prisoners (1957); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988); United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985); United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990); Code of Conduct for Law Enforcement Officials (1979); Recommendation of the Council of Europe (87) 3, European Penitentiary Rules, etc.

[93] ATF 118 Ia 64.

168. Following its tour of four Swiss prison institutions in July 1991, the European Committee for the Prevention of Torture submitted a report to the Federal Council pointing out a number of shortcomings within the field of application of article 10, paragraph 1, of the Covenant (exercise in the open air, hygiene and health, physical conditions of imprisonment, relationships between staff and prisoners, etc.). Their comments have been taken into account and the deficiencies remedied as far as possible. It would be wishful thinking, however, to claim that poor treatment or dissatisfactory conditions of imprisonment are things of the past in Switzerland. The federal authorities have undertaken, as part of their function of overall supervision of the execution of sentences and in collaboration with the cantons, to investigate allegations of poor treatment and, where necessary, to rectify the situation. For the sake of conciseness, the European Committee's report is annexed, together with the comments of the Swiss Federal Council, to the present report, rather than being included in it. Reference to them is recommended, however, because they give a representative idea of the difficulties encountered in the practical execution of sentences and measures and the treatment of prisoners in Switzerland. Following the visits conducted by the European Committee and pursuant to their recommendations submitted to the Swiss authorities, the latter sent a follow-up report to the Committee.

Conditions applicable to juvenile offenders

169. The following paragraphs describe the regime applicable to juvenile offenders and refer to paragraphs 2 (b) and 3 of article 10 of the Covenant.

170. Persons under the age of seven are outside the scope of application of criminal law in Switzerland, while persons under the age of 18 are considered as juvenile under criminal law. While being part of the Penal Code, criminal law applicable to juveniles is largely separate from that applicable to adults (fourth title of the first book and seventh title of the third book of the Code).

171. Under Swiss law, a judge examining a case involving a juvenile person must first consider whether the juvenile offender needs a special educational measure (which he will then order) or special treatment (in which case, he orders the measure required). Where neither is the case, the judge imposes a penalty. The penalties he may impose in the case of children (under 15 years of age) are a reprimand, compulsory assignment of work and short-term detention in a youth custody centre. Fines and detention may also be imposed in the case of adolescents, detention in a youth custody no longer being a possibility for this age-group. Detention may, in theory, last up to one year, but the average length in practice is a few weeks. Either medical treatment or therapeutic programmes may be ordered on an out-patient or in-patient basis. The educational measures available comprise educational assistance (support being provided to the family by specialists in the education of the juvenile offender), placement in a family or placement in an youth custody centre. Most of the juvenile persons referred to these institutions, largely run by private bodies with subsidies from the cantonal placement services and the Confederation, which therefore has some supervisory control, are assigned to them under civil law (arts. 314a and 405a of the Civil Code. See below the paragraphs concerning deprivation of liberty based on civil law). They are normally open institutions founded on socio-educational principles.

172. It should also be noted that article 88 of the Penal Code allows the judge not to impose any penalty at all if appropriate. In 1993, for example, penalties were imposed for around 7,930 offences committed by juveniles (several offences being covered by a single conviction in some cases). The majority of the offences in question came under the Penal Code (6,450) and were almost exclusively crimes against property (5,010).[94] A total of 2,852 offences were violations of traffic regulations and 972 were violations of legislation governing narcotic drugs.

173. The Penal Code specifically lists the following types of home for children (7-14 years), adolescents (15-17 years) and young adults (18-25 years):

> Youth custody centres for children (art. 84 of the Code) and adolescents (art. 91 of the Code);
>
> Therapy centres and correctional facilities for particularly difficult adolescents (art. 93 *ter* of the Code);
>
> Labour training facilities for young adults (arts. 100 *bis* and 93 *bis* of the Code).

At the present time there are 170 facilities which are recognized or provisionally recognized by the Federal Justice Office providing approximately 3,900 places.

Deprivation of liberty based on civil law

174. Articles 397a to 397f of the Civil Code deal with deprivation of liberty for assistance purposes. The conditions applicable to such non-voluntary confinement and the concomitant procedural and judicial safeguards have been described above in the chapter of this report devoted to article 9 of the Covenant. The following observations concern the complex and intricate issues surrounding the subject of respect for the individual's dignity in the context of confinement, especially in the case of enforced psychiatric treatment.

175. According to article 397a of the Civil Code, "a person of full age or under legal disability may be placed in a suitable institution when, because of mental illness or feeble-mindedness, alcoholism, drug addiction or a serious state of neglect, the necessary personal assistance cannot be provided in any other manner".

176. In the meaning of the civil law, "institutions" are only those facilities whose inmates are subject to constraints on their freedom of action beyond the constraints on independence associated with any form of community life. But in order for the condition of "deprivation of liberty" to be fulfilled it is sufficient that the person should be unable to leave the institution without permission; the institution does not need to be a closed facility. The requirement implied by the adjective "suitable" leaves a wide margin for interpretation by the cantonal authorities. However, the shortage of suitable institutions does not mean that any place of detention can be considered suitable. The decision as to whether an institution is suitable or not must be made according to the specific needs and circumstances associated with the placement of the particular person. In other words, an evaluation has to be made with respect to the particular case.[95] The Federal Tribunal has therefore ruled that "an institution is appropriate if the administration and the staff that it normally has at its disposal enable it to meet the essential needs of persons placed in it to receive care and assistance. This may, in very exceptional cases, apply to a penitentiary institution."[96]

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[94] See annexed the document entitled "*Jugements pénaux des mineurs 1993*" (Criminal judgements of minors 1993) prepared by the Federal Statistical Office, which gives detailed statistics on convictions and measures imposed.

[95] M. Stettler, "*Droit civil I, Représentation et protection de l'adulte*" (Civil law I, Representation and protection of the adult), 3rd ed., Ed. Universitaires, Fribourg, 1993, p. 211.

177. One of the most vexed issues arising in connection with the treatment of persons deprived of their liberty for assistance purposes concerns the use of psychiatric or other treatment without the consent or against the will of the person confined.[97]

178. In principle, the general rule whereby treatment may not be undertaken save with the informed consent of the patient is valid in this context too.[98] It is acknowledged, however, that the notion of enforced treatment has to be given a very broad meaning, embracing, for example, the confinement of a patient to his room.[99] The legal expedient of recourse to enforced treatment is therefore admitted and has to be regulated. However, there are still very few cantons that have detailed legislation on this matter (only the cantons of Ticino and Geneva, in fact). The precedents established by the Federal Tribunal are consequently of fundamental importance in this regard and would appear to indicate the following general principles and approaches: The wish of the patient is decisive unless the physician is acting upon a decision of an authority based on a law.[100] This decision must relate specifically to the medical treatment in question, meaning that it may not be identical with the confinement decision.[101] There is one exception to this rule that is allowed in emergencies, but the clause in question is interpreted very narrowly[102] and in such cases the decisive criterion is the presumed wish of the patient. Thus, for the Federal Tribunal, the presence of mental illness does not automatically entail the presumption of lack of discernment. On the contrary, discernment, which is defined as "the capacity to act reasonably, to appreciate the consequences of one's actions and to resist in a normal manner those who attempt to influence one's wishes",[103] is a quality which is assessed on a case-by-case basis.

179. Like any other individual, the psychiatric patient is entitled, whether or not he is capable of discernment, to objective information on the therapy envisaged in his case, even where the treatment planned is enforced (this being precisely the kind of situation where a frank approach can allay fears). Where the prospective patient has no power of discernment, consent to the treatment must be sought from his legal representative.[104] The latter may not consent to any therapy liable to compromise the physical integrity of the person concerned. With respect to enforced treatment, there is no precedent for the case of a person lacking the power of discernment and at the same time having no legal representative. Amongst legal authorities, two different opinions are expressed: some would make treatment conditional upon the prior appointment of a legal representative authorized to give his consent on behalf of his charge,[105] while for others the consent of the closest relatives is sufficient.[106]

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[96] ATF 112 II 486.

[97] It will be noted, however, that among psychiatric patients only a very small minority (estimated at around 2 per cent) are not voluntary patients. Cf. A. Finzen, "*Fürsorgerischer Freiheitsentzug und Zwangsmedikation*" (Deprivation of liberty in the interests of welfare and enforced medication), in *La législation sociopsychiatrique. Un bilan*, M. Borghi ed., Fribourg University Institute of Federalism, 1992, p. 152.

[98] See comments above on article 7 of the Covenant.

[99] M. Borghi, "*Les limites posées par l'Etat de droit au traitement forcé psychiatrique*" (The limits imposed by the rule of law on enforced psychiatric treatment) in *Revue du droit de tutelle*, 1991, p. 85.

[100] ATF 99 IV 211.

[101] M. Borghi, op. cit., pp. 89/90.

[102] The enforced administration of medication is only permitted in emergencies, when the situation is sufficiently serious and for a short period of time. Long-term enforced treatment or therapy would be in breach of the Constitution (unpublished decision of the Federal Tribunal of 7 October 1992).

[103] ATF 90 II 9.

Paragraph 2 (a)

180. The criminal procedure codes prescribe that prisoners awaiting trial should be segregated from convicted prisoners (see, for example, art. 48 of the PPF). The conditions applicable to prisoners awaiting trial take account of their status as persons who have not been convicted. As we have already seen, the prisoner remanded in custody is not subject to the obligation to work. Generally speaking, the conditions applicable to untried prisoners are more stringent than those applied to convicts; their correspondence and visits may be limited for the purposes of investigation and they have no leave entitlement. Neither do they enjoy the opportunities for leisure and training afforded to convicted prisoners.

181. Pre-trial detention, we would stress, is the exception to the rule; normally, other means are employed to ensure that the accused appears in court. The Federal Tribunal is free to verify the constitutionality of the regulations governing pre-trial detention and has established that “a set of prison regulations concerning pre-trial detention must provide for special safeguards preventing any anti-constitutional practice. To that end, it must set forth provisions which are sufficiently detailed and clearly drafted.”[107]

Paragraph 2 (b)

182. The cantonal criminal procedure codes do not all provide for the segregation of juvenile defendants awaiting trial from adults. Such segregation can not always be ensured, in fact, during pre-trial detention. Since procedural questions theoretically fall within the competence of the cantons rather than the Confederation, the Federal Council filed a reservation when ratifying the Covenant to the effect that “the separation of accused juvenile persons from adults is not unconditionally guaranteed”.

183. In connection with the current revision of the General Part of the Penal Code, it is planned to completely separate criminal law applicable to minors (persons aged under 18) from that covering adults through the adoption of a federal law on the criminal status of minors. This law, which is currently at the pre-draft stage, contains at present the following provision:

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[104] ATF 114 Ia 362/363.

[105] For example, P. Tercier, “*Le nouveau droit de la personnalité*” (The new right of the individual), Schulthess, Zurich, 1984, p. 90.

[106] M. Borghi, op. cit., p. 94.

[107] ATF 106 Ia 136.

Pre-trial detention:

1. Pre-trial detention may be ordered only if the objective pursued cannot be attained by means of a provisional protection measure.

2. Detention is carried out in a place separate from adults and with appropriate supervision. If the minor is under the age of 15 or if detention lasts longer than seven days, he must be placed in a specialized institution.

3. The procedure must be carried out with due diligence.

184. When this law enters into effect, federal law will impose on the cantons the requirement to segregate juvenile defendants from adults and the corresponding reservation can then be withdrawn. It will probably be several more years, however, before the requisite legislative process has been completed.

Final remarks

185. As mentioned directly above, the General Part of the Swiss Penal Code is currently undergoing revision to bring it more into line with developments in society and present-day needs. The situation at present is that an expert commission has been working on the pre-draft which, in respect to many matters, expressly specifies the guarantees to which detainees should be entitled. The expert commission's pre-drafts relating to the General Part of the Penal Code and a federal law on the criminal status of minors have been submitted to the Federal Tribunal, the cantons, political parties and other interested groups for consultation. On the basis of the outcome of such consultation, the Federal Council will probably take a decision in 1995 regarding the further action to be taken following the legislative work. The Committee will be kept abreast of legislative developments in this area through future periodic reports.

Article 11

186. Article 59, paragraph 3, of the Federal Constitution of 1874 abolishes imprisonment for debt. Article 42 of the Federal Act of 12 June 1959 on the military service exemption tax does, admittedly, establish the penalty of light imprisonment for culpable[108] non-payment of a debt derived from that law. This is a non-contractual matter, however, to which article 11 of the Covenant does not apply, as its wording clearly indicates.

Article 12

General

187. Article 45 of the Federal Constitution reads as follows:

> "Any Swiss citizen may settle anywhere in the country. No Swiss citizen may be expelled from the country."

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[108] ATF 116 IV 386.

188. Freedom of establishment was proclaimed in Switzerland with the 1874 Constitution and the foundation of the federal State. It has been progressively expanded through amendments to the Constitution, the present wording of article 45 dating from 1983. The notion of establishment (*établissement*) combines the fact of setting up a home with freedom to stay anywhere in the country. Thus, freedom of establishment guarantees the individual's right to remain in any part of the country, no matter how long his stay.[109]

189. Although it is forbidden to expel a citizen, extraditing him on penal grounds is compatible with article 45 of the Constitution. Switzerland extradites its nationals only to those States with which it has a reciprocity agreement and provided that the punishable act constitutes a crime or offence under Swiss law. Lastly, a Swiss citizen may be extradited only with his consent (article 7 of the Federal Act on International Mutual Assistance in Criminal Matters).

190. Article 47 of the Constitution provides for the definition of the difference between establishment and sojourn (*séjour*) by a federal law setting forth the provisions applicable to Swiss citizens during temporary residence with respect to their political and civil rights. This legislation has not materialized, and the cantons have thus retained their power to legislate in this area. They are required, however, to respect the principles of the Federal Constitution, especially that dictating equality of treatment between citizens of the canton and other Swiss citizens. Generally, cantonal laws stipulate the requirement that any person intending to extend his stay beyond a certain period should formally declare that intention. (In some cantons the administration of such matters is delegated to the communes.) Federal law entitles the cantons to require that citizens wishing to settle in their territory should submit their certificate of origin or some equivalent identity document.[110] Freedom to emigrate is also guaranteed, in conformity with article 12, paragraph 2, of the Covenant. It implies the obligation on the part of the authority to draw up and hand over, where applicable, the certificate of origin and, if the person concerned is leaving the country, the requisite identity documents.[111]

191. The constitutional right to settle in any part of the country is enjoyed by Swiss citizens only. Furthermore, this right only pertains to individuals as distinct from corporations, which are covered by the provisions of civil law should they wish to transfer their headquarters.

192. With respect to aliens, in articles 69 *ter* and 70 of the Constitution the foundations are laid for allowing exceptions to the principle of freedom of establishment in regulations applicable to aliens. Article 69 *ter* provides for the following division of competences between the Confederation and the cantons:

> The Confederation has the right to legislate on the entry, exit, sojourn and establishment of aliens.
>
> The cantons decide, in accordance with federal law, on matters concerning sojourn and establishment. In some cases federal approval is reserved.

193. On the basis of this competence, the Confederation has enacted the following statutory provisions in particular:

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[109] ATF 108 Ia 249.

[110] Order of the Federal Council of 22 December 1980 on the certificate of origin (RS 143.12).

[111] ATF 110 Ia 69. The legislation regarding the military service exemption tax provides for exceptions to ensure payment of the tax.

Federal Asylum Act of 5 October 1979 (RS 142.31) and its implementing regulations;

Federal Act of 26 March 1931 on the Residence and Establishment of Foreigners (LSEE; RS 142.20);

Implementing Regulations of 1 March 1949 of the Federal Act on the Residence and Establishment of Foreigners (RSEE; RS 142.201);

Order of 6 October 1986 limiting the number of aliens (RS 823.21);

Decision of the Federal Council of 10 April 1946 concerning the entry and declaration of arrival of aliens (RS 142.211).

194. In addition to this legislation, various international conventions and implementing guidelines are also of relevance.

195. The LSEE of 1931 is a framework law setting forth general principles in aliens police matters. The Federal Council defines its immigration policy on the basis of this law, the practical result being an order limiting the number of aliens with a view to the following:

Ensuring a balance between the size of the Swiss population and that of the resident foreign population;

Creating conditions conducive to the integration of foreign workers and residents;

Improving the structure of the labour market and ensuring an optimum balance with respect to employment.

196. With regard to regulating conditions of sojourn, Swiss domestic law does not make any distinction as to ethnic, racial or national affiliation among foreign nationals staying legally on Swiss territory. Preferential treatment, based on international bilateral or multilateral treaties (such as establishment agreements), is allowed with respect to the nationals of particular States and, as such, is not contrary to the aims of the Covenant.

Position of aliens in Switzerland

197. In Swiss law an alien does not enjoy any right to have a permit of sojourn (*autorisation de séjour*) issued, renewed or extended (art. 4 of the LSEE), unless otherwise provided by international agreements or particular provisions of domestic law.

198. Any alien who has entered Switzerland legally may reside there without special authorization until the end of the period during which he is required to declare his arrival or, if he has duly made that declaration, until a decision has been reached on his application for a permit of sojourn or establishment which he is required to file at the same time. The competent authorities may waive this rule in individual cases (art. 1 of the RSEE).

199. Entry into Switzerland is considered legal when the alien has fulfilled the requirements for submission of identity documents, completed all visa and customs formalities, etc., and has not violated any personal prohibition order such as an expulsion order or entry ban.

200. A sojourn for purposes other than employment (tourism, visit, etc.) is not subject to authorization by the aliens police if the stay does not exceed three months; after three months, it must be interrupted. The sojourn is considered to have been actually interrupted when the alien has stayed at least one month abroad. Stays without permits may not exceed a total of six months within any twelve-month period.

201. In order to obtain a permit, the alien must declare his arrival to the competent authority for his place of residence within the legally prescribed period. The permit is, in principle, prepared by the cantonal aliens police, once procedures have been completed with the competent employment authorities, where applicable. The alien may apply for a permit before entering Switzerland and in some cases is even obliged to do so. He is also required to declare his arrival even if he has already, before entering Switzerland, received an assurance of obtaining a permit of sojourn or a visa.

202. With respect to aliens police matters, the LSEE establishes two categories of permits for residence in Switzerland: the permit of sojourn and the establishment permit.

203. **The permit of sojourn** (art. 5 of the LSEE) is limited, revocable, valid for the issuing canton only and sometimes conditional. The Order of the Federal Council of 6 October 1986 limiting the number of aliens distinguishes different types of permit of sojourn:

> Permits of sojourn issued to aliens are normally for a period of one year.
>
> Provision also exists for short-term permits of sojourn.
>
> Trainee permits may be granted under bilateral and specific agreements.
>
> Seasonal permits may be granted for a maximum of nine months; the seasonal worker is required to spend at least three months abroad per calendar year.

204. **The establishment permit** is intended for aliens wishing to take up permanent residence in Switzerland (art. 6 of the LSEE). It is unlimited and unconditional. Such permits are generally issued by the authorities after an uninterrupted sojourn of 10 years. The margin of discretion is circumscribed, however, by a series of establishment agreements which establish — some as five, others as ten — the length of stay giving entitlement to an establishment permit, and by articles 7 and 17 of the LSEE.

205. In addition to the two types of permit mentioned above, border permits may also be issued to aliens domiciled in the border zone of a neighbouring State but employed in Switzerland. Such permits confer the right to work in Switzerland but not to live there. The holder of a border permit is therefore required to return to his home every day.

206. When it ratified the Covenant, Switzerland entered the following reservation:

> "The right to liberty of movement and freedom to choose one's residence is applicable, subject to the federal laws on aliens, which provide that residence and establishment permits shall be valid only for the canton which issues them."

207. This reservation was necessitated by the principle (enshrined in article 8 of the LSEE) whereby the permits issued by the aliens police are valid only for the canton which has issued them. Although this provision tends in general to limit the alien's free choice of residence on Swiss territory, there is no restriction on his free movement within a canton.

208. It should also be noted that the alien may, without further authorization additional to his permit of sojourn or establishment, stay for up to three months in a different canton without being engaged in gainful activity or work there for up to eight days. In the case of a stay or gainful activity for a longer period, and prior to taking up employment, he must obtain the approval of this canton, which then takes the place of a supplementary authorization.

209. An alien who moves (i.e., transfers the centre of his personal interests) to a different canton is required to obtain a new permit. He must report his arrival within eight days to the aliens police at his new domicile. If he has no establishment permit he may not take up employment unless he has obtained prior authorization from the aliens police (art. 3, para. 3, and art. 8, para. 3, of the LSEE). An alien in possession of an establishment permit will, in principle, be authorized to change canton. If he is a national of a State with which Switzerland has signed an establishment agreement, he will have the right to freedom of movement between cantons and may only be denied a request to change canton if legal grounds exist for his expulsion.

Restrictions on freedom of establishment for persons requesting asylum

210. Under article 12b, paragraph 4, of the Asylum Act, a person requesting asylum is required to remain throughout the entire procedure at the disposal of the federal and cantonal authorities competent to deal with asylum and aliens police matters. This does not mean, however, that his freedom of movement is limited. What it means is that he may not reside in a different commune without authorization.

211. During the initial stages of the procedure the measures applicable are appreciably more stringent. For the first few days after filing his application for asylum the applicant is accommodated in one of the Federal Registration Centres, which he may not leave without the permission of the officers in charge. If he fails to fulfil this obligation he can be accused of breach of his duty to collaborate with the authorities, who are then entitled, in the most serious cases, not to take up the request.[112]

212. While his application for asylum is being processed, the applicant is assigned a place of residence, but retains complete freedom of movement in Switzerland. He may not, however, leave the country during the procedure, but has to deposit his identity documents together with his application. If he does, none the less, go abroad, his return will be authorized within the framework of the international obligations undertaken by Switzerland.

Other restrictions on freedom of establishment

213. Freedom of establishment may be subject to restrictions provided that, as in the case of other basic rights, such an infringement is warranted in the public interest, justified by sufficient legal grounds and in conformity with the principle of proportionality.[113]

214. The Federal Act of 30 June 1927 containing the Regulations on Public Officials establishes, as do the cantonal laws, the obligation of residence for public officials. The Federal Tribunal recognizes the constitutionality of such cantonal regulations (under article 113 of the Constitution it may not rule on the constitutionality of a federal law) for reasons, specifically, relating to the tax system or in the interests of ensuring a degree of proximity between public officials and citizens.[114] These laws do, however, provide for exemptions, which are granted fairly widely in practice.

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[112] In such cases, the authority confines itself to considering whether expelling the applicant from Switzerland would violate the principle of non-refoulement or infringe article 3 of the European Convention on Human Rights.

[113] ATF 106 Ia 28.

Article 13

215. Swiss legislation with regard to aliens police matters establishes two main types of measure for removing aliens: repatriation and expulsion.

Repatriation

216. An alien may be repatriated on completion of the formal processing of his application for a permit of sojourn. In the event of a decision not to grant the permit, the alien is allowed a grace period to leave the canton in which the application was filed. If the negative decision emanates from a federal authority, the territory that the alien has to leave is that of Switzerland (art. 12, para. 3, of the LSEE; art. 17, para. 2, of the RSEE). The aforementioned decisions are conveyed to the applicant in writing and are accompanied by an explanation of the grounds for the decision and the remedies available.

217. An alien staying in Switzerland without the requisite authorization may be required to leave the country at any time without any special formalities having to be observed (art. 12, para. 1, of the LSEE and art. 17 of the RSEE). In practice, however, the repatriation option is applied extremely sparingly and in most cases the authorities take the course of pronouncing formal decisions indicating the available remedies. Furthermore, the obligation to make formal decisions also derives from procedural laws, except in certain cases of extreme urgency.

Expulsion

218. Swiss law establishes three types of expulsion decision:

> That pronounced following a criminal conviction, as laid down in articles 55 of the Penal Code and 40 of the Military Penal Code;
>
> That based on article 10 of the LSEE (administrative expulsion);
>
> That taken for political reasons relating to the security of the State (art. 70 of the Constitution).

219. Expulsion ordered by a criminal court is an ancillary penalty which may only be applied in the case of aliens sentenced to rigorous or ordinary imprisonment. It may be imposed for a period of three to 15 years. If a prisoner is on parole, the expulsion may be deferred on a probationary basis.

220. It should be pointed out that the penalty of expulsion provided by the Penal Code and that imposed by the administrative authorities are independent of one another. Whereas a criminal court will regard the convict's prospects for reintegration as a preponderant factor when deciding whether to impose expulsion, the main concern of the aliens police authorities is to maintain public order and safety. Accordingly, the Federal Tribunal allows that the latter may order the administrative expulsion of an alien without being bound by a penal judgement that does not impose judicial expulsion or else imposes it but as a suspended penalty.[115]

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[114] ATF 106 Ia 28; 103 Ia 457.

221. For a person on whom an expulsion order has been imposed by a criminal court, the normal judicial remedies available to convicted persons in criminal proceedings are available (cantonal Court of Cassation; Federal Tribunal. For a description of these remedies, see the core document forming the general part of this report, HRI/CORE/1/Add.29).

222. Administrative expulsion is provided for under article 10 of the LSEE. This provision specifies that an alien may be expelled from Switzerland or a canton for one of the following reasons only:

(a) If he has been convicted by a judicial authority of a crime or offence;[116]

(b) If his overall conduct and actions indicate that he does not wish to adjust to the established order in the country or is incapable of doing so;

(c) If mental illness renders him a danger to public order;

(d) If he himself or a person whose needs he is required to supply is continually and extensively reliant on social welfare.

223. Whatever the reason for the expulsion, this penalty is only imposed if it is deemed appropriate in the light of all the circumstances (art. 11 of the LSEE and art. 16 of the RSEE).

224. Aliens have a right of appeal based on the LSEE and the Federal Judicial Organization Act against an administrative expulsion decision. Thus, the expulsion decision must be taken by the cantonal authority with competence for aliens police matters (art. 15, subpara. 2, of the LSEE) and, if the decision of first instance is not taken by a higher authority (such as the cantonal government, for example), a remedy must be available at the cantonal level (art. 19 of the LSEE). Furthermore, expulsion decisions must be accompanied by a written explanation of the grounds for the expulsion together with an indication of the authority to be addressed in making an appeal and the time-limit to be observed. The petitioner or his representative has the right to consult the former's file unless considerations of public order and safety dictate otherwise (art. 19 of the LSEE). If he exhausts the cantonal remedies available, the petitioner still has the right of appeal to the Federal Tribunal by means of the administrative law remedy (arts. 97, 98, 100 and 103 of the Federal Judicial Organization Act).

225. Article 70 of the Federal Constitution provides that "the Confederation has the right to expel from its territory aliens who endanger the internal and external security of Switzerland". This is not a penalty, but a public order measure in the interests of the Confederation's domestic or foreign policy. Internal security is jeopardized by behaviour which seriously threatens the political orientations and constitutional foundations of the country or of public order. External security is threatened by any behaviour which weakens

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[115] ATF 114 Ib 1. A. Zünd, "*Der Dualismus von strafrechtlicher Landesverweisung und fremdenpolizeilichen Massnahmen*" (The dualism of penal expulsion and aliens police measures), in *Zeitschrift des Bernischen Juristenvereins*, vol. 129, 1993, p. 73 *et seq*.

[116] Regardless of whether penal expulsion has been imposed, cf. para. 219 above and the preceding footnote.

Switzerland's means of defence or seriously damages its relations with other countries. Since the expelled person may go to the country of his choice, this measure is not "extradition".

226. Under article 70 of the Constitution, expulsion is imposed by the Federal Council, while its execution is a cantonal matter. There is no remedy against expulsion, but it is a measure applied in very exceptional cases only.

227. Article 1 of the Additional Protocol No. 7 to the European Convention on Human Rights, which has been in effect for Switzerland since 1 November 1988, provides that "An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed: (a) to submit reasons against his expulsion; (b) to have his case reviewed; and (c) to be represented for these purposes before the competent authority or a person or persons designated by that authority". Under this provision, an alien expelled in conformity with article 70 of the Constitution ought to be entitled to exercise these rights. However, the Federal Council has found this to be incompatible with a decision taken for reasons of national security. It has ruled that if, after detailed consideration of the case, the authorities believe expulsion to be essential for Switzerland's internal or external security, the requirement to give the person concerned a hearing no longer obtains. This was the reason why Switzerland entered a reservation on this point when ratifying Protocol No. 7. Since article 13 of the Covenant allows exceptions for "compelling reasons of national security", there was no need to make such a reservation in its regard, article 70 of the Constitution being fully consistent with the requirements of this provision.

228. It should be added that an alien may not be expelled to a country where he is liable to be subjected to torture or inhuman or degrading treatment (principle of non-refoulement; see ATF 111 Ib 70 and comments above on art. 7 of the Covenant). Moreover, the Federal Tribunal considers that expulsion may in some cases infringe the right to respect for family life guaranteed by article 8 of the European Convention on Human Rights.[117]

Article 14

Paragraph 1

229. Paragraph 1 of article 14 of the Covenant contains, in the same way as article 6 of the European Convention on Human Rights, a summary of the basic principles guaranteeing a fair trial. In Switzerland, while the cantons are sovereign in matters of procedure and judicial organization, the Federal Tribunal none the less verifies that cantonal law respects the principles identified in articles 4 (right to equality) and 58 (right to a lawfully established court) of the Federal Constitution as well as the European Convention.

Scope

230. Since paragraph 1 of article 14 is applicable to criminal charges as well as disputes relating to civil rights and obligations, the meaning of these notions in Swiss law should be defined before we proceed further.

231. In accordance with the judicial doctrine of the authorities responsible for drafting the European Convention, these terms may not be interpreted simply by reference to national law. On the contrary, they have autonomous force, which is defined by the case-law relating to article 6 of the Convention.

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[117] With regard to article 8 of the European Convention, see the comments below on article 17 of the Covenant and the references quoted.

232. Where disputes of a civil character are concerned, the Federal Tribunal has, in its recent decisions,[118] referred to the principles established by the European Court of Human Rights, whereby the phrase "disputes as to rights and obligations" should not be understood in a too narrowly technical sense but calls for a material rather than formal definition.[119] The dispute must be genuine and serious; it may concern the existence of a right as well as its extent or the ways in which it is exercised. It may relate to points of fact as well as points of law. However, even if a conflict fulfils these criteria, it will not qualify as a "dispute" unless its object relates to facts and rights amenable to judicial control.[120]

233. The European Convention authorities have never given a general, abstract definition of what is meant by "civil character". Their approach to interpretation is thus casuistic by nature and tends in general to regard the areas of "private" law as having a civil character (persons; family; succession; obligations; company; rights *in rem* and intellectual property, etc.). On the other hand, the predominantly public character of certain rights excludes them from the scope of article 6 of the European Convention. This applies, for example, to public-service, tax, immigration and asylum law.

234. Because of the autonomy of the conventional notion of "rights of a civil character", various issues falling within the scope of public law in Switzerland must henceforth be considered as implying civil disputes within the meaning of article 6 of the European Convention. This applies mainly to the areas of law concerning construction and town and country planning or the regrouping of lands (expropriation procedures).[121] Referring to the previous decisions of the European Court, the Federal Tribunal has now ruled that the disciplinary penalty of suspending the right to exercise an independent profession encroaches on rights of a civil character.[122] A great many aspects of social security legislation have also been found to be prejudicial to rights of a civil character.[123] As may be noted, the Federal Tribunal takes extensive account of the interpretation given by the Convention authorities. The fact that their doctrine is constantly evolving does, however, give rise to some uncertainty with regard to the definition and scope of the notion of rights and obligations of a civil character.

235. The term "charge" and "criminal" also appear in article 6 of the European Convention and they too are given an autonomous interpretation. The European Court has defined the term "charge" as meaning "the notification by the authority of the allegation of having committed a criminal offence or else measures implying such an allegation and entailing serious consequences for the situation of the suspect".[124] The Federal Tribunal has taken up this interpretation on its own account.[125] European case-law in the criminal field defines the criteria for distinguishing between a criminal and a disciplinary offence (scope of the provision concerned, nature and seriousness of the penalty incurred). In application of these principles, the Federal Tribunal has brought within the scope of criminal law an administrative fine specified by municipal building law and imposed by the administrative authorities[126] and a similar fine for infringements of traffic regulations.[127]

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[118] ATF 117 Ia 528, 115 Ia 68.

[119] European Court of Human Rights, case of Benthem, decision of 23 October 1985, Series A 97; case of Le Compte et al., decision of 23 June 1983, Series A 43.

[120] This is not the case, for example, for university-type examinations. See European Court, case of Van Marle et al., decision of 26 June 1986, Series A 101.

[121] In this field in particular, the Federal Tribunal takes its lead to a great extent from European case-law. See ATF 111 Ib 231; 112 Ib 178; 116 Ib 162; and, most recently, 119 Ia 88 (decision of 24 February 1993).

[122] ATF 109 Ia 217.

[123] ATF 115 V 254 and very recently the European Court, case of Schuler-Zgraggen v. Switzerland, decision of 24 June 1993, Series A 263.

Guarantee of fair trial

236. The first sentence of article 14 of the Covenant invokes, in judicial terms, the general principle of equality safeguarded in Switzerland by article 4 of the Constitution. The observations made with respect to article 2 of the Covenant are therefore of relevance in this context too. As regards the legality of the courts, article 58 of the Federal Constitution reads as follows:

> "1. The right to a lawfully established court is inalienable. Consequently, no special courts may be established.
>
> 2. Ecclesiastical courts are abolished."

237. The main aim of this rule is to guarantee that no person can be subjected to trial by ad hoc or *ad personam* courts, but that the judicial process is determined by general and abstract rules — in other words, that judicial organization is established by law. Article 58 of the Constitution thus presupposes the existence of a hierarchy of competencies regulated by law. It is addressed in the first instance, therefore, to the cantonal legislature responsible for establishing a lawful judicial organization. As already indicated, the cantons are competent to deal with matters of judicial organization, administration of justice and judicial procedure, in both civil and criminal law. Article 58 protects individuals and corporations, Swiss citizens and aliens, complainant and defendant. On the other hand, persons who are only indirectly concerned with the trial (lawyers, witnesses, experts, and so forth) cannot take advantage of the protection offered by this article.[128]

238. The ban on special tribunals also applies to cases in which an action is dealt with in a special or arbitrary way by an incompetent court[129] or in the event of the arbitrary composition of an ordinary

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[124] See in particular European Court, case of Deweer, decision of 27 February 1980, Series A 35; case of Oztürk, decision of 21 February 1984, Series A 73.

[125] ATF 115 Ia 406.

[126] ATF 115 Ia 406.

[127] ATF 115 Ia 187.

[128] A. Kölz, "Article 58", in "*Commentaire de la Constitution fédérale de la Confédération suisse*" (Commentary on the Federal Constitution of the Swiss Confederation), vol. 3.

[129] ATF 39 I 84. A Court, specially appointed for a case by the cantonal parliament and made up of five judges without alternates, is deemed to have taken an arbitrary decision when four judges rule on the request for withdrawal of the fifth (decision of the Federal Tribunal of 6 July 1988, *in* RSDI, 1988, p. 220 *et seq.*).

Court.[130] This does not mean that the cantons or the Confederation may not legally institute special courts with legal competences in various specialized fields (land tribunals, commercial courts, asylum or taxation courts of appeal, etc.). Military tribunals, it will be recalled, fall within the category of such special tribunals, being regulated according to general and abstract principles, rather than that of courts of limited jurisdiction.[131]

239. In this particular regard, article 58 of the Constitution guarantees the right to a hearing by an impartial and independent tribunal in respect of both the authorities and the parties in an action. Although this right is embodied in cantonal judicial organization laws, the Federal Tribunal has complete freedom to verify that these laws are sufficient to provide the constitutional guarantee. Circumstances that have been ruled incompatible with the requirement of independence and impartiality on the part of a judge are those in which the judge's spouse works either for the representative of one of the parties in the proceedings or is that representative him or herself, or one of the members of the court is a judge who has previously acted as examining magistrate (system of personal union).[132] It should be noted that, like the European Court of Human Rights, the Federal Tribunal considers that in order to be able to validly challenge a judge, it is not necessary that he be biased in actual fact, but merely that the circumstances give rise to a legitimate suspicion of lack of impartiality.[133] It is arguably in its interpretation of the notion of impartiality and independence of the courts that the jurisprudence of the European Court has had the greatest impact on Swiss law. This is a fine example of the incorporation of international human rights law into the Swiss legal system.

240. The subject of recusation is governed by the procedural law of each canton, which is required to make provision for it under federal constitutional law. The same goes for the conditions of eligibility of judges, their terms of office, conflicts of duty, oath-taking, and so forth, which are governed by cantonal (or federal) rules of civil, criminal and administrative procedure. As a list of all the relevant provisions of the cantonal codes of procedure would make extremely lengthy reading, we have set out below, by way of illustration, the rules prescribed by the Federal Judicial Organization Act of 16 December 1943 (annexed) and applicable to the Federal Tribunal:

> Article 2
>
> Any Swiss citizen eligible for membership of the National Council may be elected as a judge or alternate.
>
> Members of the Federal Assembly or Federal Council and officials appointed by those authorities may not be judges or alternates.

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[130] ATF 105 Ia 178.

[131] Cf. core document forming the general part of this report (HRI/CORE/1/Add.29). ATF 117 Ia 381.

[132] ATF 112 Ia 290. This latter ruling, which has been confirmed a number of times, was made following the decision by the European Court of Human Rights in the case De Cubber v. Belgium of 26 October 1984, Series A 53. The principle of personal union is still applied, however, in juvenile cases; see the comments below on article 14, paragraph 4, of the Covenant.

[133] ATF 112 Ia 290; 108 Ia 51; 115 Ia 172. This latter decision concerns a judge who wrote an article in the press regarding a case before the Court of Cassation of which he was a member.

Article 3

Judges may not assume any other responsibility or public office in the service of the Confederation or of a canton, pursue another career or practise a profession.

Nor may they occupy posts as director, manager or member of the administration, supervisory body or regulatory body of a company or institution aimed at financial profit.

Article 4

Direct-line relatives by blood or marriage or relatives up to the fourth degree in collateral line, or the spouses or spouses of brothers or sisters, may not simultaneously serve as a judge or alternate of the Federal Tribunal, a federal examining magistrate, Procurator-General of the Confederation or as other representatives of the Procurator's Office.

A magistrate or official who, by entering into marriage, gives rise to a case of incompatibility is divested of his duties for this reason.

Article 5

The term of office of judges and alternates is six years.

A vacancy occurring before expiration of this term is filled at the following session of the Federal Assembly for the remainder of the period.

Article 9

Before entering office for the first time, judges and federal law officers swear an oath to perform their duties faithfully.

[...]

A solemn vow may be substituted for the oath.[134]

Article 22

Judges or alternates, the representative of the Procurator's Office of the Confederation, examining magistrates, their registrars and jurors are required to withdraw:

(a) In a case in which they themselves or the following persons have an interest: their wife, their fiancée, their relatives by blood or marriage to the degree indicated in article 4, the husband of the sister or wife of the brother of their wife, persons of whom they are tutors or guardians or to whom they are related by adoption;

(b) In a case in which they have previously acted in a different capacity, either as members of an administrative or judicial authority or as law officers, whether as the adviser, representative or counsel of a party or as experts or witnesses. Furthermore, a judge or alternate or a juror must withdraw if he is a direct-line relative by blood or marriage or relative up to the second degree in collateral line of the representative or counsel of a party.

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[134] The substitution of a solemn vow for the oath derives from the prohibition on imposing the oath, in accordance with freedom of religious belief (cf. also the comments above on article 18 of the Covenant).

Article 23

Judges or alternates, the representative of the Procurator's Office of the Confederation, examining magistrates and their registrars or jurors may be challenged by the parties or may themselves request withdrawal:

(a) In the case of a corporation to which they belong;

(b) If they have a relationship of close friendship or intimacy, obligation or particular dependence with one of the parties in the proceedings;[135]

(c) Where circumstances exist which would appear to indicate bias in the proceedings.[136]

241. The decisions involving a judge or officer who should have been withdrawn may be contested by any of the parties (art. 28 of the OJF).

242. Article 6, paragraph 1, of the European Convention on Human Rights guarantees, in the same way as article 14 of the Covenant, the right to the public hearing of court proceedings. Federal judicial doctrine infers this right from article 4 of the Federal Constitution; it is embodied in cantonal and federal judicial organization law (see, for example, art. 17 of the OJF, art. 50 of the Constitution of the Canton of Bern, art. 78 of the Constitution of the Canton of Lucerne, and so forth).

243. The principle of the right to a public hearing, as guaranteed by the European Convention, has given rise to a large number of judgements, the following being a selection:

> The public hearing principle is not merely of benefit to the parties in the proceedings but also to the general public in that it aims to preclude any executive interference in the course of justice (ATF 113 Ia 416). It protects all those subject to the jurisdiction of the courts against a secret justice beyond public scrutiny. It also helps preserve public confidence in the court system (ATF 115 V 245; 119 Ia 99);
>
> Public hearings of court cases permit public opinion to monitor the way in which justice is administered. They thus provide a guarantee for the defendant and also for all other parties in judicial proceedings (ATF 115 V 255; 111 Ia 244; 119 Ia 99);

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[135] A relationship of friendship between the judge and a person who drafted a legal opinion for one of the parties in the proceedings does not constitute grounds for discretionary withdrawal (ATF 116 Ia 141).

[136] This apparent indication of bias is evaluated, in accordance with the case-law of the organs of the European Convention on Human Rights, on the basis of objective criteria. For a detailed synopsis of case-law relating to apparent bias, see T. Poledna, "*Praxis zur Europäischen Menschenrechtskonvention aus schweizerischer Sicht*" (Application of the European Convention on Human Rights from the viewpoint of Switzerland), Schulthess, Zurich, 1993, p. 90 *et seq*.

The principle of the right to a public hearing presupposes proceedings at the procedural level at least (European Court, case of Weber v. Switzerland, decision of 22 May 1990, Series A 177). Where an appeal is possible, the public hearings principle is also applicable. It is not violated, however, if a court of cassation with only limited jurisdiction to deal with a case gives a written ruling where proceedings have been held in first instance (decision of the Court of Cassation of the Canton of Zurich, of 17 September 1991);

The principle of the right to a public hearing is not violated when one party, who has culpably placed himself in the position of being unable to appear or refuses to appear, is tried in his absence (decision of the Federal Tribunal of 23 December 1991, *in* RSDIE 1992, p. 508). This is also the case when the law does not provide for a public hearing in all circumstances but only at the request of a party or on the decision of the competent authority (ATF 115 V 256).

244. The requirement to hold a public hearing may be totally or partly abrogated, under article 17 of the OJF, in the interests of State security, public order or morality, or where required by the interest of a party or respondent. It has therefore been found that *in camera* proceedings are admissible in cases involving morals (ATF 111 Ia 244), juvenile criminal law (ATF 108 Ia 90) or deprivation of liberty for assistance purposes (ATF 114 Ia 189). Likewise, the admissibility has been established of ordering *in camera* proceedings while a psychiatric report is read out (in detail) (decision of the Court of Cassation of the Canton of Valais of 30 March 1988) or of ordering them, exceptionally, for the public but not for the press (ATF 117 Ia 387). On the other hand, the state of physical and mental health of the defendant cannot, in itself, be deemed a sufficient reason for declaring the proceedings closed to the public (decision of the Court of Cassation of the Canton of Valais of 30 March 1988). In principle, the public may not be excluded from proceedings solely in the interests of third parties who are not parties to the proceedings, exceptions being made for witnesses or for the injured party in certain special circumstances (Court of Cassation of the Canton of Graubünden, decision of 12 November 1986).

245. When acceding to the Covenant, Switzerland entered a reservation regarding the right to public hearings. Its reasons for doing so and the content and scope of the reservation are explored below.

246. As regards the publicity of the pronouncement of the judgement and in conformity with European case-law,[137] the Federal Tribunal has found that the absence of public pronouncement does not represent a breach of the European Convention on Human Rights provided that other means of learning of the judgement are made available to the public (publication of the most important decisions in law reports; possibility for any person able to demonstrate a legitimate interest in consulting the text of a judgement, etc.).[138] Furthermore, public pronouncement does not imply that the judgement has to be rendered orally; it is sufficient for the text to be made available to the public at the registry of the Tribunal (Administrative Tribunal of the Canton of Zurich, decision of 11 December 1991). The reservation entered by Switzerland to article 14, paragraph 7, of the Covenant also encompasses the requirement as to the publicity of the pronouncement of the judgement. This reservation is considered below (para. 247 *et seq.*). It might be added that some cantonal criminal procedure codes make express provision for the publicity of sentences. This is the case, for example, in the cantons of Vaud (arts. 366 to 368), Fribourg (art. 39), Aargau (art. 166) and Geneva (art. 326).

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[137] European Court, case of Sutter v. Switzerland, decision of 24 February 1984, Series A 75.

[138] ATF 115 V 245.

247. With regard to article 14, paragraph 1, of the Covenant, Switzerland has entered the following reservation:

> "The principle of a public hearing is not applicable to proceedings which involve a dispute relating to civil rights and obligations or to the merits of the prosecution's case in a criminal matter; these, in accordance with cantonal laws, are held before an administrative authority. The principle that any judgement rendered shall be made public is adhered to without prejudice to the cantonal laws on civil and criminal procedure, which provide that a judgement shall not be rendered at a public hearing, but shall be transmitted to the parties in writing.
>
> The guarantee of a fair trial has as its sole purpose, where disputes relating to civil rights and obligations are concerned, to ensure final judicial review of the acts or decisions of public authorities which have a bearing on such rights. The term 'final judicial review' means judicial examination which is limited to the application of the law, such as a review by a Court of Cassation."

248. This text corresponds to that of the reservation and the interpretative declaration made by Switzerland regarding the European Convention. This parallel approach is prompted by a desire for consistency in the application of the international commitments undertaken. In view of the fact, however, that the European Court has been called upon to review the legitimacy (from the point of view of the Convention) of this reservation and interpretative declaration, it is worth while at this point taking a look at its relevant decisions and pointing out their implications for the equivalent reservation to article 14 of the Covenant.

249. On 29 April 1988 the European Court, in its Belilos decision (Series A 132), found that Switzerland's interpretative declaration regarding final judicial review of criminal and civil actions was not in conformity with the requirements of article 64 of the European Convention, which proscribes reservations of a general nature and prescribes that any reservation should be accompanied by a "brief description of the law at issue".

250. Having noted that the Belilos decision concerned a criminal matter, the Swiss Government found that its interpretative declaration continued to be applicable to civil actions. It amended the text accordingly (it is this version which is adopted in the reservation to article 14, paragraph 1, of the Covenant) and added to it the list of federal and cantonal provisions in question. However, the Federal Tribunal, by its decision of 17 December 1992,[139] judged this new statement to be null and void on the grounds that it had not been filed at the time of accession to the Convention, as required by article 64 of the latter.

251. As to the reservation made regarding the principle of the **right to a public hearing** (art. 6, para. 1, of the Convention), the European Court declared this principle to be invalid by its decision of 22 May 1990 in the case of Weber v. Switzerland (Series A 177). It would therefore appear that both the interpretative declaration on final judicial review and the reservation on public hearings are null and void from the point of view of the Convention. As regards the reservation concerning the **publicity of judgements**, the question of its validity has not yet been formally settled (on the latter question, see para. 253 below).

252. Turning to the question of how these developments have affected the validity of the reservation to article 14, paragraph 1, of the Covenant, it may be noted that the Court's declaration of the reservations to the European Convention as invalid (with the exception of that concerning the publicity of the judgement) is based on failure to fulfil the conditions for the validity of reservations established by article 64 of the Convention. This article stipulates, in particular, that reservations must be entered at the time of signature of the Convention and be accompanied by a brief description of the law at issue. The Covenant, however, does not establish any such conditions. Furthermore, the reservations entered by Switzerland to article 14, paragraph 1, of the Covenant are in conformity with the Vienna Convention on the Law of Treaties of 23 May 1969, so that their validity is beyond question. Nevertheless, to the extent that Swiss legislation has been and will be directly affected by the declaration that the reservations on the European Convention are invalid and will need to be revised accordingly, there will be no point in maintaining the equivalent reservations to the Covenant once this revision has been carried out. It should then be possible to withdraw these latter reservations.

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[139] ATF 118 Ia 473 *et seq.*

253. The validity of the reservation regarding the publicity of the judgement (according to which it is sufficient for the judgement to be communicated to the parties in writing) has not been challenged by the European Court of Human Rights.[140] This does not imply, however, that there was no justification for reiterating the reservation with respect to article 14 of the Covenant. In its general comment 13 (21), the Commission on Human Rights stresses that "the judgement must, with certain strictly defined exceptions, be made public". It is impossible, however, to prejudge the question of whether, following the example of the European Court,[141] the Commission will consider that mere communication of the sentence to the parties, accompanied by the publication of the most important judgements in official collections and their communication to persons demonstrating a legitimate interest,[142] is sufficient to fulfil the requirement of publicity of the sentence. Moreover, although the Swiss practice with respect to the publicity of the sentence has been found to be in conformity with the European Convention, it may give rise to problems in certain particular cases. The authorities are aware of this, as shown by the recent stance taken by the Department of Justice of the canton of Zurich to the effect that the openness of justice to the public serves collective, political interests, which override the preferences of the accused, so that a verdict may remain secret only on the grounds of public security or the protection of minors.[143]

Paragraph 2

254. Articles 6 of the European Convention on Human Rights and 14 of the Covenant both enshrine the principle of the presumption of innocence whereby any person being criminally prosecuted is presumed innocent until proof of his guilt has been indisputably and legally established by an irrevocable judgement. Likewise, the inadequacy of the proof presented by the person responsible for adducing it creates a doubt which benefits the accused (*in dubio pro reo*).[144]

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[140] In its decision Sutter v. Switzerland, the Court even found the Swiss practice to be consistent with the principle of the publicity of the judgement, as guaranteed by article 6 of the European Convention. See the European Court, case of Sutter v. Switzerland, decision of 22 February 1984, Series A 74.

[141] See the Sutter decision above.

[142] In conformity with federal case-law.

[143] Cf. the article published in the *Nouveau Quotidien* of 6 April 1993 under the heading "*La justice zurichoise ne pourra plus protéger ses notables*" (Zurich's judicial system can no longer protect its public figures). The newspaper reports that the action taken by the cantonal Department of Justice followed the refusal by a judge to allow the press to be informed of a minor sentence imposed on a public figure (drunken driving) on the grounds that doing so would be tantamount to punishing the person twice over.

[144] The principle of presumption of innocence is explicitly set forth in a number of cantonal constitutions; see, for example, art. 8 of the Constitution of the canton of Zug and art. 4 of the Constitution of the canton of Geneva. To the extent that case-law has inferred this principle from the Federal Constitution, the cantonal provisions have no autonomous application.

255. According to the relevant case-law, this principle imposes various obligations on the public authorities. The latter are required, for example, to conduct proceedings in an impartial manner and without any prejudice as to the guilt of the accused. A judge or senior official may, of course, inform the public of the investigation of a criminal offence currently under way or of suspicions in connection with a person, but he must refrain from suggesting in any way that a person is guilty before judgement.[145]

256. The Federal Tribunal has had occasion to rule on the relationship between the presumption of innocence and press articles lacking objectivity in the official record of pending proceedings. In particular, it considered the danger that such articles might influence the trial court and ruled that each passage of a press article containing allegations of the guilt of the accused should be reworded to show clearly that the allegations are no more than suspicions and that judicial proceedings are under way.[146]

257. The principle of presumption of innocence implies that the burden of proof should rest with the prosecution. In other words, it is not up to the accused to prove his innocence. Similarly, where the evidence is insufficient, the accused must be given the benefit of the doubt.[147]

258. It is only in rare cases that the burden of proof rests with the accused. This applies, for example, to cases of defamation where the accused pleads the defence of truth (art. 173 of the Penal Code) or in the realm of justifications (self-defence, necessity, etc.). But this is a normal application of the right to be heard and to adduce exonerating evidence.

259. A further problem concerning presumption of innocence arises in connection with various cantonal procedural provisions which prescribe that a person who is acquitted or whose case is dismissed for lack of evidence may be assigned all or part of the court fees if he has wrongfully caused proceedings to be instituted against him or has prolonged them (see articles 207 of the Valais CPP), 262 of the Berne CPP, 158 of the Vaud CPP, etc.). In a case concerning Switzerland, the European Court of Human Rights ruled that such a decision violated the principle of presumption of innocence where the Tribunal, in the grounds invoked regarding court fees, suggested either directly or indirectly that it considered the individual in question to be guilty despite the fact that the proceedings had not resulted in a conviction.[148] This practice is tantamount to judging an individual as guilty without allowing him to defend himself by means of proceedings in conformity with articles 6, paragraph 1, of the European Convention and 14 of the Covenant. The Federal Tribunal has been following the decisions made in this respect and has ruled, in particular, that "the fact of assigning costs to the plaintiff who is acquitted is in breach of the principle of presumption of innocence not only where the text of the decision contains a direct negative assessment, but also where the negative assessment emerges somehow or other from the text of the decision".[149] Fees may not, therefore, be assigned to the acquitted plaintiff except on the grounds that he has clearly infringed in an objectionable manner some legal rule of conduct (rather than a rule of ethics, for example) deriving from the Swiss legal system and has thus given rise to the proceedings or prolonged them.[150] It is clear, however, that mere exercise of the rights of defence, such as the right not to reply, does not constitute objectionable conduct.[151]

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[145] Decision of the European Commission on Human Rights regarding the petition of Petra Krause v. Switzerland, DR 13, p. 73 *et seq*.

[146] ATF 116 IV 31; 116 Ia 14.

[147] Decision of the Federal Tribunal of 7 February 1985, not published, as quoted by G. Piquerez, "*Précis de procédure pénale suisse*" (Summary of Swiss criminal procedure), Payot (CJR), Lausanne, 1987, p. 181.

[148] European Court of Human Rights, case of Minelli, decision of 25 March 1983, Series A 65: Having had his case dismissed for lack of evidence following the expiry of the time-limit for prosecution, the plaintiff was assigned two thirds of the court fees on the grounds that, had the time-limit not expired, he would almost certainly have been convicted.

Paragraph 3

260. Paragraph 3 of article 14 sets forth a number of guarantees to which any individual accused of a criminal offence must be entitled. In general, these guarantees are enshrined in the various cantonal laws of criminal procedure. (By way of illustration, reference will be made below mainly to the Federal Act concerning Penal Procedure of 15 June 1934 (henceforth PPF), annexed.) Where the guarantees provided under cantonal law are insufficient with respect to the requirements of article 14, the Federal Tribunal, in pursuance of articles 4 of the Constitution and 6 of the European Convention on Human Rights, fills these gaps by means of the public law remedy.[152]

Right to be informed of a criminal charge

261. The right enshrined in article 14, paragraph 3 (a), of the Covenant, as interpreted by the Commission in its general observation 13 (21), is recognized in both cantonal and federal criminal procedure (see articles 40 and 41 of the PPF, 61 of the Valais CPP and 138 of the Neuchâtel CPP). Where this guarantee is not explicit it is inferred from article 4 of the Constitution.[153] In general it is not specifically set forth in the cantonal codes that the information must be given in a language that the accused understands. On the other hand, all of the cantonal codes except that of Zug make provision for the presence of an interpreter.

262. The Federal Tribunal has ruled that it is not sufficient merely to state the allegations against the accused, but that their legal classification must also be indicated.[154] The accused is entitled, however, on his request[155] only to translation of the main documents (i.e., according to the precedents established by the European Court of Human Rights, those which are necessary for the fair conduct of the proceedings) of the case file if he is unable to pay the translation costs.[156]

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[149] ATF 115 Ia 309. See also 114 Ia 301 and 112 Ib 455.

[150] ATF 116 Ia 162.

[151] ATF 109 Ia 167.

[152] A. Haefliger, "*Die Europaïsche Menschenrechtskonvention und die Schweiz*", Stämpfli, Bern, 1993, p. 176.

[153] Decision of the Federal Tribunal of 12 June 1979 *in* RSDI 1980, p. 261. In this decision the Federal Tribunal indicates that the right to require that the documents submitted be translated free of charge is enjoyed only by a plaintiff who cannot afford to pay for the translation.

[154] Decision of the Federal Tribunal of 13 September 1988, *in* RSDI 1990, p. 250.

[155] ATF 118 Ia 462.

[156] Decision of the Federal Tribunal of 12 June 1979, *in* RSDI 1980, p. 261.

Right to adequate time and facilities for the preparation of his defence

263. All the cantonal codes of criminal procedure and also the Federal Act on Criminal Procedure (arts. 35 to 38 of the PPF) provide that the accused has the right to be assisted by a defence counsel of his choice. Where the accused does not exercise this right, he is in certain specific cases mandatorily provided with an officially assigned counsel. (Article 104 of the Vaud CPP makes provision, for example, for such a "mandatory" defence counsel for all cases involving the public prosecutor or where pre-trial detention has continued beyond 30 days.) In principle, the counsels should be advocates or pupil advocates enrolled on the cantonal bar roll. Advocates from other cantons or abroad may also act provided they obtain the requisite authorization.

264. If he is imprisoned the accused is permitted to communicate with his counsel as soon as the first hearing by the judge is over. The cantonal codes stipulate that this communication should, in principle, be free, but case-law admits of limitations in certain exceptional cases where provided for by law and demanded by the public interest and where the measure is proportionate.[157] The Federal Tribunal considers, however, that there can be no question of limiting free communication with the defence counsel throughout the entire investigation.[158] For its part, the European Court of Human Rights, through its decision of 28 November 1991 in the case of S. v. Switzerland, ruled the restrictions imposed on contact between a person accused of acts endangering the public order (attacks involving explosives) and his counsel to be excessive. In that particular case, the correspondence between the two had been inspected and sometimes intercepted, access to the case file had been only partially granted to the counsel and some of his interviews with the accused had taken place in the presence of a police officer who took notes. The Court considered that these measures, which continued for over seven months, were disproportionate in relation to the (undeniable) seriousness of the offence and the alleged risk of collusion. This decision underscores the exceptional nature of any restriction on free communication between a counsel and his client. It also establishes the principle of the inviolable secrecy of their conversations. Finally, it should be pointed out that in cantons where certain types of defendants may be "held incommunicado", the resulting severe limitation of their contact with the outside world does not extend to their contact with their defence counsel, even where there is official surveillance.[159]

265. A party in proceedings or his representative are entitled to consult the case file. This principle applies to all documents of importance in the preparation of the defence (i.e., all documents that may be used in substantiating a decision). Limitations founded on the need to safeguard overriding public or private interests (protection of persons called to give information, personality rights, etc.) may also be imposed, but in such cases a rule similar to that stipulated in article 28 of the Federal Act on Administrative Procedure of 20 December 1968 is applicable: a document to which access has been denied may only be used to his disadvantage if the examining authority communicates to him, either orally or in writing, the main substance of the document and also gives him an opportunity to comment and to submit counter-evidence. Furthermore, the right to consult the file is not guaranteed at all stages of the proceedings and is, in fact, normally denied during its first stages.

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[157] ATF 111 Ia 341. In a decision of 20 November 1986, the Federal Tribunal ruled that suspicions to the effect that the counsel of a plaintiff had lent him assistance to evade justice on a previous occasion justified the limitations imposed on their free communication. The risk of collusion may also necessitate such restrictions.

[158] ATF 106 Ia 226.

[159] ATF 103 Ia 293.

266. The question as to whether, in a particular case, a plaintiff has had sufficient time to prepare his defence cannot be answered in general terms. Account has to be taken of the circumstances of each case — for example, of the complexity of the file.[160] From the point of view of the Federal Tribunal, the following grounds may justify a very short period of preparation (perhaps no more than a few hours): the danger that the sentence likely to be imposed will in any case be shorter than the period of pre-trial detention, the absence of serious charges against him and disputes regarding the factual status of the case.[161]

Right to be tried without undue delay

267. Contrary to the wording of article 14, paragraph 3 (c), of the Covenant, both Swiss law and the European Convention on Human Rights guarantee the right to judgement within a reasonable period of time in civil proceedings also. It is recognized, however, that this principle is of particular importance in criminal proceedings (especially in the case of pre-trial detention, cf. art. 9, para. 3, of the Covenant). Some cantonal constitutions, moreover, make explicit provision for this right (for example, those of Zurich, Uri, Nidwalden and the Jura).

268. The many precedents established by federal and European case-law indicate a general pattern in this regard. Thus, it is recognized that in criminal justice the duration of proceedings should be measured from the time of the individual's official notification of criminal charges against him up to the time of the judgement of last instance.[162]

269. The "reasonable" duration of criminal proceedings cannot be established in general but has to be decided according to the particular circumstances of each case. The European Court of Human Rights has identified a number of criteria for establishing whether the duration of proceedings is excessive (complexity of the case; importance of the case for the parties; attitude of the parties and the authorities), which the Federal Tribunal has also adopted. Two decisions may be cited as examples, the first ruling that a period of 12 years between the institution of proceedings and the judgement of first instance "far exceeds what may be considered to be reasonable", and the second recognizing that in a complex case involving over 20 companies a period of seven years is admissible.[163]

Right to defend oneself

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[160] A. Haefliger, "*Die Europäische Menschenrechtskonvention und die Schweiz*", Stämpfli, Bern, 1993, p. 179, and the references to the decisions of the European Commission of Human Rights quoted elsewhere.

[161] Decisions of the Federal Tribunal of 14 November and 14 December 1990, *in* RSDIE 1991, p. 432 *et seq*.

[162] European Court of Human Rights, case of König, decision of 28 June 1978, Series A 27; case of Eckle, decision of 15 July 1982, Series A 51.

[163] Decision of the Court of Cassation of the Canton of Zurich of 17 December 1990, *in* SJZ 1991, p. 155, and decision of the Federal Tribunal of 29 March 1990, *in* RSDIE 1991, p. 421. The European Commission of Human Rights, for its part, ruled that criminal proceedings lasting over 12 years in a case of financial crime were not in breach of the Convention since their duration was not due to the inactivity of the authorities but to the complexity of the offences involved and the fact that the defendant had availed himself of numerous remedies (decision of 4 December 1991 on the admissibility of the petition of Oezenc v. Switzerland).

270. The right to a hearing, inferred from article 4 of the Constitution, implies the right to be present during the proceedings and the trial and to be assisted by a counsel. The following paragraphs will deal with the legal assistance system on the one hand and the provisions governing trial by default on the other.

271. As soon as he is notified of the charges against him, the accused is informed of his right to be assisted by counsel of his choice. Authorization to practise as a member of the bar and the provisions governing the bar fall within the scope of cantonal law. In all the cantons, advocates are required to take on officially assigned cases and to deal with them with the same diligence as their private briefs.

272. The case-law of the Federal Tribunal grants the accused a constitutional right to legal assistance (provided for by many cantons in their constitutions or criminal procedure codes) in the following cases:

> The offence in question is of a certain degree of gravity (i.e., not "trivial") and the case poses factual or legal difficulties which the accused cannot tackle without assistance;
>
> The accused could be liable to a term of imprisonment greater than 18 months or some other substantial penalty;
>
> In other specific cases which, while not being of such gravity, have specific features necessitating legal assistance (for instance, where the pre-trial detention or state of health of the accused prevents him from preparing a suitable defence, the public prosecutor will intervene, etc.).

273. The authorities' obligations, however, go beyond assigning counsel; in addition, they have to ensure that the latter performs his brief with due diligence.[164] In this connection the question arises as to the precise time from which a defendant should be entitled to the assistance of a defence counsel if the guarantees of a fair trial are to be observed. For the European Court of Human Rights, the answer to this question is largely a function of the particular features of the proceedings in question and the circumstances of the case.[165]

274. In a recent decision,[166] the European Court recognized the relevance of these criteria from the viewpoint of the European Convention. It nevertheless ruled that a violation of the Convention had taken place, notably because the accused had been denied legal assistance on the grounds that the term of imprisonment he was probably going to be awarded was under 18 months. The Court found, among other arguments and contrary to the practice of the Swiss judiciary, that in order to establish the degree of the penalty incurred, account should be taken of the maximum penalty provided for by law and not the penalty which, according to the circumstances of the particular case, would probably be awarded. This decision is bound to reinforce the trend towards making the provision of legal assistance more flexible in Switzerland.

275. The right to defend oneself in person is not an absolute right. The very notion of a fair trial entails that, in certain circumstances (where serious charges are brought), the accused should be assisted by a counsel, even if he wishes to conduct his own defence. In such cases, the Federal Tribunal does, however, take up appeals lodged by the accused and not by his officially assigned defence counsel.[167] The accused may not, however, demand that the action taken by his counsel and his defence strategy be subject to his prior approval.[168]

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[164] Decision of the Federal Tribunal of 21 March 1984, *in* RSDI 1985, p. 271.

[165] European Court of Human Rights, case of Imbrioscia v. Switzerland, decision of 24 November 1993, Series A 275.

[166] European Court of Human Rights, case of Quaranta v. Switzerland, decision of 24 May 1991, Series A 205.

276. The officially assigned defence counsel is paid an allowance by the State, the amount of which is charged against court fees. Like the translation costs, the costs of legal assistance are added to the court fees. When the accused who has been assisted by an officially assigned counsel and/or by an interpreter is ordered to pay the court costs, the latter will comprise the fees of the aforesaid counsel and interpreter. Switzerland has therefore ratified the Covenant with a reservation to subparagraphs (d) and (f) of paragraph 3 of article 14, under which the guarantee of free legal assistance assigned and of the free assistance of an interpreter does not definitively exempt the beneficiary from defraying the resulting costs.

277. In order to safeguard the impartiality of the judicial system and its concern for factual truth, the cantonal legislatures have all sought ways of ensuring that the accused appears before the court (writ of summons sent to the known home address; judicial edict; search warrant; distraint order imposed upon a recalcitrant party). Some cantonal codes even provide that, if the presence of the accused seems essential, the court should suspend the hearing until he has been arrested (Jura, Lucerne, Schwyz). However, the legislative authorities have often made provision, under certain circumstances, for the pronouncement of a default judgement.

278. Default judgement should not be confused with the mere absence of the accused (for example, because he has been given permission not to appear personally). A person is deemed to be judged by default only when, despite being regularly summoned, he does not appear or is not represented at the hearing. The regularity with which he is summoned is thus an indispensable condition for the validity of a default judgement. In the case of compulsory appearance, the accused must be summoned personally and not through his counsel.[169]

279. Furthermore, the conditions applicable to default vary from one canton to the next. For example, Aargau proscribes default judgement where there is some means of compelling the accused to appear. In other cantons (for example, in Geneva) provision for default judgement may not be used against minors, the aim being to enable the court to rule on the basis of the personal state of the minor at the time of the trial rather than that of the offence. From the procedural point of view, two systems may be identified: that in which the absent defendant is tried by means of a summary procedure in which the trial proceeds without the confrontation of prosecution and defence; and that which, after an investigation conducted in the normal manner, trial proceedings take place on the basis of the adversarial principle.[170] Some cantonal codes prohibit the presence of a defence counsel, which the Federal Tribunal has not found to be in conflict with the right to a hearing in view of the possibility of requesting a default retrial.[171] Again according to

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[167] ATF 102 Ia 27.

[168] ATF 106 IV 88.

[169] ATF 71 I 1.

[170] G. Piquerez, "*Précis de procédure pénale suisse*", 2nd ed., revised and supplemented, Payot (CJR), Lausanne, 1994, p. 420 *et seq.*

[171] JdT 1982 III 121. Piquerez, op. cit., loc. cit., criticizes this finding.

established precedents, a defendant who fails to appear is not entitled to request the reinstitution of proceedings from which he has voluntarily remained absent.[172]

280. All the cantons allow a person convicted by default to request a retrial by the same court in his presence (default retrial), provided, however, that the period established for prosecution of the case does not elapse in the meantime. However, some codes require a defaulting defendant to adduce evidence demonstrating that his absence is due to extenuating circumstances (such as illness, etc.), while others make no such provision. In general, the request has to be made within certain legally defined time-limits, the different codes being fairly liberal in that they permit consideration of late applications in exceptional circumstances. The cantons of Bern, the Jura and Fribourg even permit a further request for the resumption of a trial in the case of excusable absence from proceedings following the first request for a new trial. Finally, several legislations permit a combination of retrial and ordinary remedies at law (Bern, Jura) and, indeed, even consider excusable prevention from appearing as grounds for review.

Right to have witnesses called and examined

281. According to the case-law of the Federal Tribunal, this is one aspect of the right to a hearing guaranteed by articles 4 of the Constitution and 6, paragraph 3 (d), of the European Convention on Human Rights. Thus, the accused has a constitutional right, irrespective of the existing cantonal procedural provisions (see, for example, arts. 56 and 131 of the Valais CPP), to be present on at least one occasion during the proceedings,[173] at the hearing of witnesses for the prosecution and to question them. If he is unable to be present, he has the right to state his position on the basis of the official written record of the witnesses' testimonies.[174] Likewise, the accused has the right to propose forms of evidence, and hence the hearing of witnesses for the defence, provided that the latter are relevant.[175] It is admitted that the judge may terminate the investigation if the evidence adduced seems to him conclusive and if, having systematically assessed the further evidence offered, he is convinced that it would not cause him to change his mind.[176] Appeal is possible (in conformity with cantonal procedural provisions) against a refusal of evidence in these circumstances.

282. In a recent case concerning Switzerland, the European Court of Human Rights considered the problem of testimonies given by police officers in the absence of the accused and with no opportunity for the latter or his counsel to question the witnesses. (The case in question involved drug trafficking in which the testimony of an "infiltrated agent" had been submitted in writing only.) The Swiss authorities justified the refusal to permit questioning of the witness by the defence on the grounds of the need to preserve his anonymity and hence enable him to continue his investigations. However, the Court was to find as follows:

> "Neither the judge nor the courts were able or wished to give Toni (the infiltrated agent) a hearing and to proceed to a confrontation for the purpose of comparing the latter's statement with the

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[172] ATF 106 Ib 400.

[173] If the confrontation takes place on only one occasion, it is sufficient only if the accused is assisted by his counsel (ATF 116 Ia 289).

[174] ATF 113 Ia 422.

[175] ATF 106 Ia 161.

[176] ATF 103 Ia 490.

> allegations brought by Mr. Lüdi (the accused). Furthermore, neither the latter nor his counsel had any opportunity to question him at any stage of the proceedings and thus to cast doubt on his credibility. Yet it would have been possible to proceed in such a way as to take account of the legitimate desire of the police, in a drug trafficking case, to preserve the anonymity of their agent in order not only to protect him but also to continue using him in the future."[177]

283. Following this decision, the Federal Tribunal revised its doctrine accordingly, ruling that the testimony of an infiltrated agent was inadmissible when the accused had not been able to confront and question him.[178]

Right to the assistance of an interpreter

284. As mentioned above, the cantonal criminal procedure codes all make provision for the presence of an interpreter when the accused does not understand (or understands poorly) the language of the court. In conformity with the reservation lodged by Switzerland to article 14, paragraph 3 (f), of the Covenant, the interpreter's fees may be added to the court fees and charged to the convicted person.

285. It is up to the accused, if he wishes to have the assistance of an interpreter during the hearing or to obtain translations of the documents adduced, to make a specific request to that effect.[179] As a general rule, the right to obtain a translation of the judgement is not recognized unless this seems necessary for the proper conduct of the proceedings (for example, if the translation is essential for an appeal to be effectively lodged).[180]

Right not to testify against oneself or to confess guilt

286. Article 41 of the PPF, which has its equivalent in the cantonal constitutions and penal procedure codes (for example, art. 74 of the Constitution of Bern, art. 4 of the Constitution of Nidwalden and arts. 62 and 63 of the Valais CPP), specifies that the court must refrain from any coercion, whether threat or promise, any furnishing of untrue information and any specious question. It is forbidden, in particular, to use such means to elicit a confession. At all events, the accused has the right to refuse to reply to questions (this right being expressly embodied in specific texts, such as the penal procedure codes of Bern and the Jura). In such cases, the proceedings are continued despite the refusal.

287. If the accused agrees to reply to questions, he is not obliged to tell the truth.[181] If, however, the inquiry is prolonged as a result of his attitude, this may constitute grounds for not deducting the period of pre-trial detention from the sentence imposed.[182]

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[177] European Court of Human Rights, case of Lüdi v. Switzerland, decision of 15 June 1992, Series A 238.

[178] Decision of the Federal Tribunal of 7 August 1992 (ATF 118 Ia 327). This principle also applies to the hearing of informers: ATF 118 Ia 457.

[179] ATF 118 Ia 462.

[180] ATF 115 Ia 65, 118 Ia 462.

[181] ATF 106 IV 372.

[182] ATF 86 IV 184, 103 IV 8.

288. The comments on the provisions enabling confessions or other testimonies obtained by means of torture (see comments above on art. 8 of the Covenant) to be declared inadmissible in court are also of relevance here and may be worth recalling.

Paragraph 4

289. Articles 82 to 99 and 369 to 373 of the Federal Penal Code impose a number of basic rules on the cantons with regard to the organization of courts and the procedures to be followed with respect to children and adolescents, although it is within the competence of the cantons to decide whether offences committed by juvenile persons should be dealt with by the judicial or by the administrative authorities.

290. Articles 83 and 90 of the Penal Code require the competent authority (to be designated by each canton) to ascertain the facts and, if need be, gather information on the conduct, education and circumstances of the juvenile person and to obtain reports or expert opinions on his physical and mental condition. For it is not the act committed, but — in connection with this act — the findings emerging from examination of the child or adolescent (in terms of his material and non-material circumstances, his background, character, physical and mental state, circle of family and friends, etc.) which should dictate the decision that the competent authority is called upon to make. According to the results of this examination, the court must decide whether the juvenile person is normal or not and, depending on the conclusion it reaches, will classify the young offender according to one of the following three categories: children and adolescents in need of special educational care (arts. 84 and 91 of the Penal Code); those who are physically or mentally ill and need special treatment (arts. 85 and 92 of the Penal Code); and finally those who are neither in moral danger nor abnormal or ill.

291. This preliminary inquiry is of great importance. Firstly, like any other criminal investigation, its aim is to enable the facts to be established so that the ingredients of the offence can be determined and, secondly, its purpose is to suit the treatment to the individual, i.e. to categorize the accused with a view to ordering appropriate measures. All the information required regarding the minor's conduct, education and circumstances should be collected, and reports or expert opinions on his physical and mental state need to be drawn up where necessary. Finally, articles 83 and 90 of the Penal Code permit the cantonal authority to order the minor or adolescent to be detained for observation purposes.

292. The cantons are competent to decide matters of judicial and procedural organization with respect to minors. They have all established special juvenile courts. In general terms, the following common principles can be identified:

(a) The principles of general criminal procedure are applicable on a secondary level, where cantonal legislation does not depart from them;

(b) The educational and social principles at the basis of juvenile criminal law must inform the course of the investigation and trial as well as the execution of punishment;[183]

(c) In the interests of the minor, public access to the proceedings may be reduced and the right of the accused to consult certain documents in the case-file may be overruled. In addition, the minor may be requested to withdraw from the proceedings for all or part of their duration;

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[183] Regarding the execution of punishments in the case of minors see the comments above on article 10 of the Covenant.

(d) *Ex officio* defence must be assigned more extensively than in the case of adults and as soon as the investigation begins (ATF 111 Ia 81);

(e) In all the cantons it is ensured that separate investigations are conducted in cases involving adult and juvenile co-defendants.

293. Traditionally and in keeping with the educational and social welfare objectives of procedure applicable to minors, the cantons accept the principle of so-called "personal union" whereby it is the same judge that conducts the investigation, pronounces judgement and has competence with regard to the execution of punishment.

294. This practice has been criticized from the point of view of the guarantee of impartiality of the judge, as provided by article 6, paragraph 1, of the European Convention on Human Rights.[184] In 1988 a Geneva court established that the rule of the separation between the investigating judge and the trial or appeal court judge should also apply to proceedings involving minors.[185] The other cantons, however, have not brought their practice into line with this ruling, and this would seem to be in conformity with the case-law of the European Court of Human Rights, which recently refused to find a breach of article 6, paragraph 1, of the Convention in the fact that the same judge had ruled in the matter of remanding a young Dutchman in custody, had led the investigation and had conducted the trial.[186]

Paragraph 5

295. The remedies available to a person found guilty of a criminal offence are described in the core document forming the general part of this report (HRI/CORE/1/Add.29), to which reference should be made. These remedies fulfil the requirements of article 14, paragraph 5, of the Covenant. With regard to the remedies available in criminal proceedings, however, the following qualifying remarks should be made. Once the remedies provided for in the cantonal codes of procedure have been exhausted, it is possible for the accused or his beneficiaries, any complainant or the public prosecutor of the canton to lodge an appeal on a point of law with the Court of Cassation of the Federal Tribunal on the grounds of breach of federal law. The public law remedy on the grounds of breach of constitutional rights is subject to a number of conditions (art. 269 of the PPF). The appeal is made by filing a statement within 10 days of notification — as required by cantonal law — of the contested decision with the authority that took the decision. An explanation of the reasons for the appeal must be submitted within 20 days of receipt of the written decision. Subsequently, one or more exchanges of documents may be ordered and in exceptional cases oral proceedings may be authorized (art. 276 of the PPF). If the appeal is admitted, the case is referred to the cantonal authority for retrial (art. 277 *ter* of the PPF). In the case of an appeal on a point of law, the jurisdiction of the Federal Tribunal is limited, however, to the application of the law; this is probably not, strictly speaking, an appeal in the sense of article 14, paragraph 5, of the Covenant.[187] We refer to it here in this report for the sake of completeness.

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[184] See, for example, M. Hotelier, "*Le droit des mineurs d'être jugés par un tribunal impartial au sens de l'article 6 §1 CEDH*" (The right of minors to be tried by an impartial court within the meaning of article 6, paragraph 1, of the European Convention on Human Rights) in *La Semaine Judiciaire*, 1989, p. 133 *et seq.*

[185] Decision of the Court of Cassation of the Canton of Geneva of 29 April 1988.

[186] European Court of Human Rights, case of Nortier v. the Netherlands, decision of 24 August 1993, Series A 267.

296. The principle of two-tier proceedings (i.e. the appeal court system) cannot be applied when a person is convicted, in the first instance, by the Federal Tribunal in conformity with article 340 *et seq.* of the Penal Code and articles 7 to 12 of the PPF. This is why Switzerland ratified article 14, paragraph 5, of the Covenant, with a reservation regarding the federal laws on the organization of criminal justice, which provide for an exception to the right of anyone convicted of a crime to have the conviction and sentence reviewed by a higher tribunal where the person concerned is tried in the first instance by the highest tribunal, namely the Federal Tribunal.

Paragraph 6

297. In the federal judicial system, as in that of the cantons, a miscarriage of justice entailing the review of a conviction confers the right to compensation on the victim of the miscarriage (for example, art. 237 of the PPF, 357 of the Bern CCP and 332 of the Jura CCP). This right is also guaranteed by article 3 of Protocol No. 7 to the European Convention on Human Rights, in force for Switzerland since 1 November 1988.

298. While some cantons (Bern, Basel-Country, Appenzell Ausser-Rhoden, Glarus, Lucerne, Valais, Geneva, Fribourg and the Jura) recognize the discretion of the competent authorities to order the payment of compensation, others, together with the federal laws, accord a wrongly convicted person the right to claim such compensation provided certain legal conditions are fulfilled. Both cantons and Confederation provide for compensation not only for a miscarriage of justice discovered during a review procedure, but also in the case of dismissal or acquittal. In all these cases, the wrongly convicted person is reinstated in all his rights and any fines and costs paid by him are reimbursed. He is also entitled to reimbursement of his lawyer's fees and, according to federal case-law, may claim compensation for any material and non-material damage suffered,[188] provided that the wrongful conviction was not due to any culpable conduct on his part.[189]

299. In Switzerland, miscarriages of justice are rectified, where a new fact is adduced or discovered, through a review procedure and not through an application for pardon, as in other States. According to the Swiss way of thinking, pardon does not annul the judgement, unlike review, but merely eliminates its execution.[190] Thus, in Switzerland, no request for compensation can be made on the basis of article 14 of the Covenant after a pardon has been granted.

Paragraph 7

300. The rule whereby no one may be prosecuted or punished for an offence for which he has already been acquitted or convicted by a final judgement (*non bis in idem*) is one effect of the principle of *res judicata*. Under Swiss law, it is a matter of public policy and federal law (ATF 56 I 75, 86 IV 50). The defence of

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[187] Cf. M. Novak, "CCPR Commentary", Engel, Kehl, Strasbourg, Arlington, 1993, p. 268.

[188] Only two cantons (Zug and Appenzell Inner-Rhoden) limit this right to compensation to material damages due to the deprivation of liberty.

[189] ATF 84 IV 46. G. Piquerez, "*Précis de procédure pénale suisse*", Payot (CJR), Lausanne, 1987, p. 483.

[190] ATF 80 IV 11.

res judicata may be raised *ex officio* at any stage of the trial. For this rule to apply, however, person, subject-matter and cause of action must all be the same in the second trial as in the first.[191]

301. The identity-of-cause condition, in particular, prohibits an individual who has been tried in conformity with legal requirements from being prosecuted again for the same act but under a new classification. However, for the Federal Tribunal, "the decision taken by a penal authority with only limited investigatory powers by reason of the matter involved only entails application of the *non bis in idem* rule within the limited framework of the sphere of competence of that authority. Such a decision is no obstacle to a new judgement being delivered in respect of the same acts, where the latter also constitute another offence whose punishment falls within the jurisdiction of a different authority."[192]

302. It should be noted, finally, that the Swiss Penal Code applies the principle of double jeopardy and disallows a new prosecution or else takes into account a sentence served abroad where an offender has already been tried by a foreign court for the offence and is prosecuted again in Switzerland for the same act (arts. 3 to 7 of the Penal Code). Protocol No. 7 to the European Convention on Human Rights, which has been in effect for Switzerland since 1 November 1988, contains a guarantee comparable to the present paragraph 7.

Article 15

303. The adage *nulla poena sine lege* is reflected in article 7 of the European Convention on Human Rights and in article 1 of both the Swiss Penal Code and the Swiss Military Penal Code, which provide that "no one may be punished unless he has committed an act expressly punishable by law". The stress placed by the legislator on this principle underlines the importance he attaches to complete respect therefor. Although these articles are not directly applicable at federal level, the Federal Tribunal has extended their scope to the few areas still reserved for cantonal penal law by ruling that their content forms an integral part of the public freedoms guaranteed by the Constitution[193] (Cf. ATF 112 Ia 11).

304. Case-law indicates that the principle of *nulla poena sine lege* is violated if a citizen is subjected to criminal prosecution for an act that is not punished in penal law or if the judge seeks to interpret penal law in such a way as to apply it to an act which, according to the rules of interpretation that are generally accepted in penal matters, should not be covered thereby (cf. ATF 112 Ia 107).[194]

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[191] G. Piquerez, "*Précis de procédure pénale suisse*", Payot (CJR), Lausanne, 1987, pp. 472 and 473.

[192] ATF 112 II 79. In the particular case in question, the issue at stake was whether the judicial authority was entitled to prosecute a car driver for causing bodily injury through negligence when his conduct had already been punished as a petty offence under traffic regulations.

[193] Article 335 of the Federal Penal Code allows the cantons competence to legislate on minor infractions that are not covered by federal legislation, as well as contraventions of cantonal administrative, procedural or fiscal regulations.

[194] It has been ruled, for example, that credit card abuse, which is not specifically sanctioned, can be punished only by the legislator and not by judicial interpretation of other provisions of the Penal Code (cf. ATF 112 IV 82).

305. The principle of *lex mitior*, also incorporated in article 15 of the Covenant, appears in the Penal Code (art. 2) and the Military Penal Code (art. 8). It applies to a person who is being judged when the law is changed. Furthermore, article 336 of the Penal Code sets out, with regard to the implementation of judgements rendered in compliance with penal laws in force before the entry into force of the Penal Code, that the punishment can no longer be executed if the current code does not punish the act in respect of which the sentence was pronounced (art. 336 (a) of the Penal Code). The main purpose of this article was to smooth the passage from the cantonal penal codes to the unified Federal Penal Code. It is envisaged that this provision will be tailored to current needs as part of the amendment of the General Part of the Penal Code. The provision will henceforth no longer apply only to penalties, but also to measures. The pre-draft of article 336 of the Penal Code has the following tenor: "If a judgement has been rendered in compliance with a previous law, the penalty or the measure may no longer be executed if the current code does not punish the act in respect of which the sentence was pronounced".

Article 16

306. The absolute recognition of the legal personality of the individual follows, in Swiss constitutional law, from the individual's personal freedom. This freedom is an unwritten constitutional right, established by the Federal Tribunal in 1963, which, as already indicated, protects "all elementary freedoms whose exercise is indispensable to the development of the human being".[195] It is therefore guaranteed both to Swiss citizens and to foreigners.

307. Article 11 of the Swiss Civil Code provides that every person enjoys civil rights and that, consequently, each person has, within the limits of the law, equal capacity with regard to rights and obligations. Legal personality is protected from birth to death. A child that has been conceived enjoys civil rights on condition that it is born alive (article 31 of the Civil Code).

308. Although the enjoyment of civil rights, and therefore the recognition of the legal personality of each individual, allows for no exception, the exercise of civil rights, that is to say the capacity to assume an obligation by one's own acts, is subject to a number of conditions, such as the capacity for discernment, coming of age and the absence of any hindrance, pursuant to article 369 *et seq.* of the Civil Code, which provide, in certain cases (drunkenness, prodigality, feeble-mindedness or the request of the person concerned), for a guardian to be appointed.

309. Article 27 of the Civil Code lays down that no one may, even partially, renounce the enjoyment or exercise of civil rights.[196] Similarly, by virtue of article 49, paragraph 4, of the Constitution, the exercise of civil and political rights may not be hindered by any requirements or conditions of an ecclesiastical or religious nature.

Article 17

General

310. Article 17 of the Convention provides protection against any arbitrary or unlawful interference with privacy, family, home or correspondence. It also prohibits unlawful attacks on honour and reputation.

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[195] ATF 109 Ia 273, spec. 279.

[196] With regard to the exercise of civil rights, an exception must be made for cases of voluntary interdiction, pursuant to article 372 of the Civil Code, when certain conditions are fulfilled (senility, infirmity or inexperience).

311. In the Swiss legal order, these guarantees are embodied in a number of constitutional provisions, some of them unwritten. Mention should be made of article 4 (equality), article 36, paragraph 4 (confidentiality of the mails) and article 34 *quinquies* (family policy) of the Federal Constitution, as well as article 8 of the European Convention on Human Rights which contains provisions similar to those in article 17 of the Covenant. None the less, it is the case-law of the Federal Tribunal that has made the right to respect for privacy and the family an aspect of the unwritten constitutional right to personal freedom.[197]

Right to respect for privacy

General

312. The constitutional guarantee of respect for privacy prohibits the State, with certain exceptions provided for by law that are in proportion to the purpose pursued, from interfering in the intimate sphere of the individual, within which the individual may develop his or her personality. The intimate sphere includes, in particular, health, philosophical and religious convictions, and occupational or private relationships (including sexual relationships) with others. In the case of arbitrary or unlawful interference by the State or by third parties in an individual's privacy, the individual may initiate civil actions (article 28 *et seq.* of the Civil Code on protection of the personality) or penal actions (article 173 *et seq.* of the Penal Code on attacks on honour and on secrecy or privacy).

Special aspects

313. **Searches**. Searches may only be made if they are provided for by law: the codes of penal procedure and the penitentiary regulations contain provisions governing searches and body searches (see, for example, articles 67 to 73 of the Act concerning Federal Penal Procedure, annexed).

314. With reference to identity checks, the Federal Tribunal considers that a person who is unable to prove his or her identity may be obliged to go to a police station for verification, provided that there is a de facto situation that justifies such a measure (presence at a place where a criminal act has just been perpetrated, resemblance to a person sought, etc.).

315. The penitentiary regulations and, sometimes, the cantonal codes of penal procedure require that a body search must be carried out by a person of the same sex. The case-law of the Federal Tribunal imposes this in all cases, even in the absence of specific rules.[198] A draft amendment to the General Part of the Swiss Penal Code expressly envisages that body searches may be conducted only by a person of the same sex.

316. The new Federal Law of 4 October 1991 on Assistance to Victims of Offences (RS 312.5, annexed) contains provisions to safeguard the privacy and intimacy of the victim during the penal procedure (see, in particular, articles 5 and 6 of that Law).

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[197] ATF 102 Ia 516 and ATF 109 Ia 179.

[198] ATF 109 Ia 154. Exceptions may be tolerated only in special cases and if there are imperative security requirements (same decision).

317. **Data protection**. The new Federal Act of 19 June 1992 concerning the Protection of Personal Data (annexed), which came into force on 1 July 1993, brings together and supplements the provisions on that subject, which had been incomplete and spread over a number of legal texts. This Act contains principles that are applicable both to the public administration and to individuals.

318. Other provisions came into force on the same date as the Act concerning the Protection of Personal Data:

> An amendment to the Penal Code, dated 19 June 1992, establishing the legal bases for the exchange of information between the Confederation and the cantons in penal prosecutions, embodying provisions on the computerized investigation system (art. 351 *bis*), exchanges of data by Interpol (arts. 351 *ter* to 351 *sexies*), the identification service of the Government Procurator's Office of the Confederation (art. 351 *septies*) and the communication of information relating to current criminal proceedings (art. 363 *bis*);
>
> An amendment to the federal penal procedure, dated 19 June 1992, designed to establish the legal bases for data protection in the area of judicial police inquiries and to create precise legal bases for coercive measures ordered by the criminal police;
>
> An amendment to the Penal Code, dated 19 June 1992, introducing an article 321 *bis* governing professional secrecy with regard to medical investigation and permitting the lifting of medical confidentiality for the purposes of medical investigation, as well as article 179 *novies* sanctioning the removal of personal data;
>
> An amendment to the Code of Obligations, setting out that, in connection with the job contract, an employer may make use only of data on the employee that are essential for the purposes of the job in question (article 328 (b) of the Code of Obligations);
>
> An amendment to the Federal Act concerning International Private Law, dated 19 June 1992, governing jurisdiction in connection with actions in execution of the right of access and the applicable law;
>
> An amendment to the Federal Judicial Organization Act (art. 100), dated 19 June 1992;
>
> The Order of 14 June 1993 relating to the Federal Act concerning the Protection of Data;
>
> The Order of 14 June 1993 concerning the Processing of Personal Data in the Application of Preventive Measures in the Area of State Protection;
>
> The Order of 14 June 1993 concerning Authorizations to Lift Professional Confidentiality with Regard to Medical Investigation.

319. The Federal Act concerning the Protection of Data applies to all processing of personal data by federal organs or private persons (individuals or legal entities). It follows a non-technological approach and thus covers both computerized and manual processing of personal data. It protects the human and fundamental rights of individuals and bodies corporate whose personal data are being processed. Some exceptions are envisaged in the field of application and, in particular, the Act does not apply in principle to the processing of personal data by the cantonal organs. The Act is none the less applicable to them when they are not subject to cantonal provisions on data protection and they are processing data pursuant to federal law.

320. The Act defines the general principles applicable to the processing of data, which constitute the hard core of the Act: legality of the data collection process, good faith, proportionality, purpose, data accuracy, guarantee of the rights of the person in cases of communication abroad and security of data. Furthermore, the Act sets out the material rules governing the processing of personal data.

321. In the private sector, these rules are based on the provisions regarding personal rights in the Swiss Civil Code (art. 28). Thus, anyone who processes personal data must not unlawfully attack the personal rights of the persons concerned. The Act specifies, in particular, that personal rights are unlawfully attacked when the data are processed in violation of the general processing principles or against the express will of the person concerned, or when sensitive data or personality profiles are communicated to third parties, if the data user or communicator cannot show grounds to justify this. The Act sets out three grounds for justification: the consent of the person concerned, the preponderant private or public interest or the law. It also indicates certain cases in which the processing of personal data may constitute a preponderant interest: processing directly linked to the conclusion or implementation of a contract; processing within the framework of present or future economic competition with another person (without communication to third parties); data processed to evaluate the creditworthiness of a person (not relating to sensitive information or personality profiles) and not communicated to third parties unless they have need thereof to conclude or implement a contract; data processed for purposes not concerned with the person (for example, statistics); data processed for publication in the editorial section of a periodical publication; data relating to a public personality, in so far as the data refer to that person's public life. Finally, personal rights are not unlawfully attacked if the person concerned has made the information available to all and has not opposed the processing thereof.

322. In the public sector, the Act is founded on the principle of the prohibition of the processing of personal data unless it rests on a legal basis, in accordance with the principle of the legality of administrative activity. In particular, the processing of sensitive data or of personality profiles must, in principle, be expressly governed by a law in the formal sense (federal laws and federal decrees of general scope, subject to referendum, resolutions of international organizations that are binding on Switzerland and international treaties approved by the Federal Assembly, embodying rules of law). The Act also specifically governs certain stages in the processing, such as the collection, communication and destruction/storage of the data. Thus, the communication of data by federal organs may occur, in general, only if there is a legal basis or if the recipient absolutely requires the data, in the specific case, to perform his legal task. Communication may also take place if the person concerned has consented thereto or if circumstances lead one to presume that such consent has been given, if the person concerned has made the data accessible to all or if the recipient makes it credible that the person concerned refuses agreement or opposes communication only to prevent the recipient from enforcing legal claims or protecting other legitimate interests.

323. The Act also attaches importance to the rights of the persons concerned. In particular, it guarantees the right of access whereby any individual may ask the person responsible for maintaining a data record if information on him or her is kept therein. That person must notify him or her of all information regarding him or her that are contained in the data record, as well as the purpose and legal basis of the need to keep such information, the types of information kept, participants in the data record and the recipients of the information. The right of access is not absolute and may, in certain cases defined by law (particularly laws in the formal sense, preponderant interests of a third party, preponderant public interest, preponderant interest of the person responsible for maintaining the private data record, involvement in any penal investigation or examination procedure), be refused, limited or deferred. The person concerned also has the right to correct or destroy inaccurate and illicit data, to assert his or her rights before the judicial authorities or to oppose, to a certain extent, the processing or communication of personal data.

324. Persons responsible for maintaining data records must also comply with certain obligations. In particular, they must announce their data records to the federal official concerned with information protection so that they may be recorded in the register of data records. This register is open to the public. The federal organs must announce all their records of personal information, whereas private individuals must only announce them when they regularly deal with sensitive information or personality profiles or when they communicate information regularly to third parties. This obligation to announce the existence of a data record does not apply if the person responsible for maintaining the private data record is required, by virtue of a legal obligation, to process or communicate the information or if the person concerned is aware of the processing or communication thereof. Persons responsible for maintaining data records must also announce the transfer of records abroad if the communication does not arise from a legal obligation and is effected unknown to the persons concerned. In addition, persons responsible for maintaining data records must guarantee the protection of the information by appropriate technical and organizational measures (data security) specified in the Order relating to the Federal Act concerning the Protection of Data, in terms of the objectives to be achieved.

325. The Act also indicates the organs responsible for monitoring the application of the federal provisions on data protection. The organ most directly concerned is the federal official responsible for data protection, who has an independent monitoring and advisory function, but no decision-making power. Nevertheless, he may make recommendations if a federal organ processes personal data in violation of the relevant legal provisions. He may also make recommendations regarding private individuals who process personal data when the processing method may jeopardize the personal rights of a large number of persons (system error) or when the data records have to be recorded or communications abroad have to be declared. The federal official has wide-ranging powers of investigation. His legal obligations include the duty of notifying the Federal Council regularly of his activities and findings. These reports are published. The official must also advise private persons or public organs with reference to data protection and he may inform the public of his findings and recommendations, if that is in the pubic interest. The second specific organ responsible for monitoring the application of the federal provisions on data protection is the Federal Data Protection Commission. This Commission deals with arbitration and recourse.

326. Alongside the entry into force of the Act concerning the protection of Personal Data, the Federal Council decided to initiate ratification of Convention 108 of the Council of Europe for the Protection of Individuals with regard to Automatic Processing of Personal Data (1981). The relevant message to the Federal Parliament is being prepared so that ratification may be envisaged early in the next legislature.

327. Fourteen cantons have a law on data protection: Geneva, Vaud, Neuchâtel, Valais, the Jura, Bern, Ticino, Thurgau, Lucerne, Basel-Country, Basel-Town, Uri, Schaffhausen and Zurich. Others have regulations in the form of orders or directives (for example, Schwyz, Graubünden, Solothurn, Appenzell Ausser-Rhoden and Zug). Several cantons expect to adopt such legislation in the next two or three years (for example Fribourg, Glarus and Solothurn).

Protection of the family

General

328. In Switzerland, the family is acknowledged as the fundamental unit of society and is protected by the State on the basis of articles 54 and 34 *quinquies* of the Federal Constitution. Article 54 protects the right to marry and article 34 requires the Confederation to take account, in the exercise of the powers conferred on it, of the needs of the family. Mention should also be made of articles 12 and 8 of the European Convention on Human Rights which protect the right to enter freely into marriage and the right to privacy and family life, respectively.

329. In the Swiss legal order there is no "standard" definition of the family. On the contrary, the concept varies and may include different situations, depending on whether it relates to private law, fiscal law, aliens police matters or social legislation, for example. Thus, the concept of the family may cover a varying circle of persons, depending on the purposes of the regulations concerned. None the less, if it is necessary to select one definition of the family, it will be that proposed by the group of federal experts in 1982: "Social group, based on the relationships between parents and children and acknowledged as such by society, that is to say institutionalized".[199]

330. According to this definition, the main characteristic of the family is the presence of children. It makes it possible to consider all forms of the family, including those formed by a single mother or father for the purpose of raising children, or those in which the children live away for educational reasons. It is neither limiting nor legally constricting. For instance, the absence of children does not prevent an alien married couple from obtaining family reunification in Switzerland (on this subject, see below).

331. Mention may also be made of the jurisprudence of the European Court of Human Rights on the concept of "family life" (adopted in principle by the Federal Tribunal), whereby the protected ties extend in any case to relatives "playing a decisive role in the family".[200] This principle, which can be interpreted in a very flexible manner, may be used to cover particular needs and hypotheses in each area of application of the law.

Special features

332. The right to respect for family life implies principally that the members of a family are free to live together. This right is, however, not absolute and may be subject to limitations, the most important of which are indicated below.

333. Civil law provisions (Civil Code, part III, "Guardianship"; article 296 *et seq*., "Parental authority") govern the conditions and form of intrusions by the civil authority in family life when the interest of the child requires that measures be adopted (curatorship, guardianship, withdrawal of parental authority or the right of custody, etc.). The same applies to the assignment of the right of custody or of parental authority as well as visiting rights after divorce.[201]

334. In principle, States have the sovereign right to decide on the conditions governing the entry of foreigners into their territory and their residence there. The exercise of this sovereign right is, *inter alia*, limited in certain circumstances, by the right to respect for family life.[202] The following paragraphs cover Swiss regulations concerning family reunification of foreign nationals.

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[199] Cf. "*La politique familiale en Suisse*" (Family policy in Switzerland), final report submitted to the Head of the Federal Department of the Interior by the "Report on the Family" Working Group, 1982, p. 7.

[200] On the concept of "family life", as indicated in the jurisprudence of the European Court and of the Federal Tribunal, see, in particular, P. Mock, "*Mesures de police des étrangers et respect de la vie privée et familiale*" (Aliens police measures and respect for privacy and family life), in *Revue de Droit Suisse*, 1993, No. 2 and the references mentioned.

[201] Cf. also the comments below on articles 23 and 24 of the Covenant.

[202] In this connection, see the Committee's general comment 15 (27), concerning the situation of foreigners with reference to the Covenant, particularly paragraph 5.

335. There are two federal law provisions that set out the right to family reunification: articles 7 and 17 of the Federal Act of 26 March 1931 on the Residence and Establishment of Foreigners (henceforth LSEE, annexed). Article 7, paragraph 1, of the LSEE gives the foreign spouse of a Swiss citizen the right to the granting and extension of a permit of sojourn, even if the spouses do not live together. These rights cease if there are grounds for expulsion or if the marriage is unconsummated (same article). In the case of the spouse of a foreign national holding an establishment permit for Switzerland,[203] the spouse has a right to a permit of sojourn as long as the spouses live together. This right extends to unmarried children aged under 18 years, provided that they live with their parents. The right ceases if the party concerned commits an offence against public order (art. 17 of the LSEE). However, in practice, only a serious offence triggers the loss of this right.

336. Family reunification of other foreigners is governed by the Order of 6 October 1986 Limiting the Number of Foreigners (henceforth OLE, annexed), which does not grant a right to family reunification. As a rule, foreigners whose stay in Switzerland is only temporary (seasonal workers, participants in training courses, students, etc.) may not avail themselves of the right to a family reunification (art. 38, para. 2, of the OLE). None the less, the members of their family may reside with them as visitors (for two three-month periods each year). According to article 38, paragraph 1, of the OLE, a foreigner with an annual permit of sojourn may be joined in Switzerland by his or her spouse and dependent children aged under 18 years. This possibility is subject to a number of conditions: a period of stay and, if applicable, a money-earning activity that seem sufficiently stable, communal life with the family in appropriate accommodation and adequate financial resources. Failure to fulfil these conditions may limit the possibility for the persons covered by these requirements to live together as a family.

337. As indicated above, Swiss law has no general definition of "family". For the purposes of immigration and family reunification, the family includes, in principle, only the spouse and unmarried children aged under 18 years.[204]

338. Taking into account the interpretation of article 8 of the European Convention on Human Rights by the European Court of Human Rights, the case-law of the Federal Tribunal has, however, evolved to accept that, in certain special circumstances, a child who is of age may qualify for the right to respect for family life in order to obtain the right to join his or her parents in Switzerland.[205] Following a ruling by the European Court of Human Rights,[206] the Federal Tribunal has also changed its practice and is now ready to consider cases relating to recourses based on article 8 of the European Convention on Human Rights in the case of a refusal of a permit of sojourn to a child or to whichever of the child's parents has not been assigned parental authority.[207] The family relationship must, however, be intact and in place and one of the parties concerned must have the right to settle in Switzerland.[208]

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[203] Regarding the different types of authorization to stay in Switzerland, see the comments above on article 12.

[204] Articles 7 and 17 of the LSEE and article 38 of the OLE. However, in accordance with the bilateral commitments of Switzerland *vis-à-vis* Italy, Spain and Portugal, the age limit for family reunification has been raised to 20 years for nationals of those countries.

[205] ATF 115 Ib 1. The case was that of a handicapped Italian woman of 21 years of age whose parents had sent her to a specialized school in Italy, but wanted her to rejoin them in Switzerland.

[206] European Court of Human Rights: Berrehab case, ruling of 21 June 1988, Series A 138.

339. According to the letter of the law, Swiss legislation does not grant unmarried partners the right of family reunification. However, in practice, the authorities may, as an exception, grant a permit of sojourn if the union is a stable one and if the partners have a common child, or if there is a legal obstacle to the conclusion of marriage.

340. Homosexuals living together as couples are excluded from the application of the Swiss rules on family reunification and also from the protection of family life offered by article 8 of the European Convention and article 17 of the Covenant. In practice, in a personal case of extreme seriousness, a permit of sojourn may be granted as an exception.

Protection of the home

341. Pursuant to the Swiss Civil Code, the domicile of an individual is the place where the individual resides with the intention of establishing a home (art. 23 of the Code). However, the term "domicile" should not be interpreted in this strict sense here. On the contrary, it should be used to include the place where an individual habitually lives (including a holiday home) and the place where the individual carries on his or her usual occupation,[209] if contacts of a personal type have been made there (lawyers' offices, for example) or it is difficult to distinguish the occupational and private activities of the person concerned. The domicile thus defined is protected against arbitrary or unlawful interference, whether by the State or by individuals.

342. With reference to impairment of rights by individuals, the provisions of the Penal Code that deal with impairment of privacy or secrecy, particularly article 179 *bis* to 179 *septies*, make punishable the recording of non-public conversations and their dissemination, as well as violation of privacy by means of cameras or misuse of the telephone. Buildings police legislation, environmental protection legislation and civil law (neighbours' rights) also help protect the home from impairment of rights by third parties.

343. With reference to impairment of the right to protection of the home by the State, this mainly concerns searches of the home or surveillance ordered as part of a criminal investigation. Such impairments are subject to the general obligations of legality and proportionality (see, for example, article 66 *et seq.* of the Federal Act concerning Penal Procedure, annexed). Article 179 *octies* of the Penal Code lays down that anyone who, by virtue of an express authorization set out in law, orders official surveillance measures to cover the mail and telephone or telegraphic communications of specific individuals, or prescribes the use of technical surveillance equipment, shall not be punishable, provided that he immediately seeks the authorization of the competent judge. This approval may be given for the purpose of prosecuting or preventing a crime or an offence whose seriousness or particular features justify such action.

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[207] ATF 115 Ib 97.

[208] In the same decision, however, the Federal Court reserves the possibility of guarding against abuse of the right.

[209] General comment of the Committee No. 16 (32), paragraph 5.

Protection of correspondence

344. Article 36, paragraph 2, of the Constitution guarantees the inviolability of the confidentiality of letters and telegrams. This is a specific constitutional right protecting the personal rights of the individual.[210] Regarding the field of protection, the method of transmission and the technique used are not decisive factors and transmissions by telephone or by fax are therefore equally protected. As indicated above, article 179 *et seq.* of the Penal Code provide for punishment of the violation of sealed envelopes and packages, as well as the interception and recording of private conversations.

345. The confidentiality of the mails may, however, be subject to certain restrictions, provided that such restrictions have a legal basis, that they are in the public interest and that they comply with the principle of proportionality. As a general rule, surveillance measures require a legal basis, both as regards the law governing personal and telegraphic communication and as regards criminal law and criminal procedure. In principle, surveillance is authorized only if the criminal proceedings relate to a crime or an offence whose seriousness or particular features so justify, if specific circumstances render the individual to be subject to surveillance suspect of being the perpetrator of an offence or of having participated in an offence and if, without surveillance, the necessary investigations would be considerably more difficult to conduct or if other investigative procedures have been fruitless. The surveillance agencies are required to restrict themselves to the elements justifying specific surveillance. It is therefore necessary to seek the approval of the competent judge (art. 179 *octies* of the Penal Code). Furthermore, the surveillance agencies must ensure that the information collected is not communicated to third parties and, apart from exceptions based primarily on the country's internal or external security, that the individual concerned is subsequently informed of the grounds for the surveillance carried out, as well as the duration and method used therefor (see, for example, articles 66 to 66 *quinquies* of the Federal Act concerning Penal Procedure, annexed).

346. In the case of the correspondence of persons in pre-trial detention or in prison, reference should be made to the chapters dealing with articles 9 and 10 of the Covenant, as well as, in particular, the comments set out below on article 19, paragraph 3, of the Covenant. It is generally accepted that, although prisoners have the same rights as free individuals to respect for their correspondence, the normal and reasonable requirements of detention are sometimes relevant in assessing the justification for any interference with this right (restriction on the number of letters that a prisoner may write each day, monitoring or interception of correspondence).

Protection against unlawful attacks on an individual's reputation

347. Anyone whose reputation has been attacked, either by an individual or by a representative of the State,[211] may initiate civil actions (art. 28 *et seq.* of the Swiss Civil Code, in particular, with reference to attacks in the press — article 28 (g), *et seq.* of the Civil Code establishes a right of response) and criminal actions (defamation, calumny and insult, articles 173 to 177 of the Penal Code).

Article 18

Paragraphs 1 to 3

348. In Switzerland, freedom of conscience and religion is inviolable. No one may be obliged to belong to a religious association, to receive religious education or to participate in a religious ceremony, or incur penalties of any kind because of religious opinion (article 49 of the Constitution). This guarantee, which obliges the State to adopt a position of religious neutrality,[212] protects all religious views or beliefs, even those held by small minorities, as is the case in Switzerland of Mormons, Scientologists, Jehovah's Witnesses, or Methodists.[213] Freedom of thought, conscience and religion is also guaranteed by article 9 of the European Convention on Human Rights.

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[210] ATF 109 Ia 280.

[211] In this case, it will be necessary to apply in advance, if relevant, for an authorization to prosecute. Cf. comments above on article 2, paragraph 3, of the Covenant.

349. The cantons are free to determine their relationships with the churches. In particular, while respecting freedom of conscience and belief, they may designate one or more churches as "official churches" and, for example, provide for the remuneration of their ministers, subsidize them or allow them to raise taxes. The practice adopted by the cantons has been deemed to be in accordance with the general principle of equality.[214]

350. The Constitution also protects the right to change religion and therefore to leave a church to which one belongs. Although the Federal Tribunal allows the churches to establish a special procedure to enable a member to leave, that procedure must not constitute an obstacle to the wishes of the person concerned.[215]

351. Freedom of conscience also means that an individual may not be required to take an oath, whether before the courts or in connection with the individual's appointment to a public office. The relevant texts and standard practice allow for replacement of the oath by a solemn promise.

352. Religious opinion alone is not enough to exempt an individual from fulfilling a civic duty, such as military service, and refusal to serve is punished by a term of imprisonment, as set out in the Military Penal Code (depending on the case, the punishments range from a few days to 10 months in prison). However, article 81 of the Code was amended on 15 July 1991. From that date, it has been possible for anyone who can make it credible, on the basis of fundamental ethical values (which may be of religious nature), that he cannot reconcile military service with the requirements of his conscience, to do work of value to the community instead of going to prison. This obligation to work for a period corresponding, in principle, to one and a half times the entire period of service refused, but not more than two years, is not indicated in the individual's police record. In 1994 and 1993, the relevant statistics were: of 239 refusals to do service in 1994 (409 in 1993), 162 or 68 per cent (268 or 65 per cent) were validly based on a conflict with fundamental ethical values; 77 (140) sentences of imprisonment were handed down, 153 (249) individuals were required to do work of value to the community and 9 (19) soldiers were allowed to serve without carrying arms.[216]

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[212] ATF 113 I 370.

[213] Same decision. Also see the decision of the Second Court of Public Law of the Federal Tribunal of 18 June 1993, in the case of A. and M. v. the Council of State of the Canton of Zurich, ruling that the constitutional guarantee also protects minority beliefs within a religion (ATF 119 Ia 178). There are no statistics regarding the membership of these minority religions. For information on the religious breakdown of the resident population in Switzerland, see the core document forming the general part of this report (HRI/CORE/1/Add.29).

[214] See the annexed reply by the Swiss Government to the questions of the Special Raporteur of the Commission on Human Rights regarding religious intolerance (Commission resolution 1990/27 of 2 March 1990).

[215] ATF 104 Ia 84.

353. On 17 May 1992 the people and the cantons accepted the proposal, made for the third time, that civilian service should be introduced in replacement of military service. Article 18 of the Constitution now envisages, alongside the obligation to serve, the principle of civilian service, which must be translated into practical terms by the legislator. This democratic decision has established the constitutional basis for the introduction of civilian service. The Federal Council therefore prepared a draft law on civilian service, which it adopted as a message to the Federal Parliament on 22 June 1994. This draft does not allow for a choice not to serve. The obligation to serve will remain the rule: the individual will not have the right to choose freely between military service and civilian service. Anyone who can make it credible to a civilian commission that he cannot reconcile the obligation of armed service with his conscience may do civilian service in replacement. The consultation procedure regarding this draft law has been completed and the draft is currently being examined by a commission of the National Council. It can be anticipated that the law could become effective at the beginning of 1996. For the time being, the present arrangements for work of value to the community will be eliminated, while the possibility of serving without bearing arms will probably be retained.

354. Article 49, paragraph 6, of the Constitution lays down that no one is required to pay taxes whose proceeds are specifically used to pay for worship by a community to which he or she does not belong. This provision does not, however, allow for the deduction of the share of a general tax that may be allocated to worship in one of the main churches in a canton, to which the taxpayer in question does not belong.

355. According to case-law, corporate bodies may not avail themselves of freedom of conscience and religion to evade payment of a tax, on the grounds that they have neither conscience nor belief,[217] unless the corporate bodies in question are engaged in pursuing, in accordance with their statutes, a religious or ecclesiastical purpose.[218]

356. The right to celebrate a religion through worship is guaranteed by article 50 of the Constitution, and the right to hold a moral or other conviction is guaranteed by freedom of expression.[219] In accordance with paragraph 3 of article 18 of the Covenant, these may be restricted only if there is a preponderant public interest and bearing in mind the general principle of proportionality. Thus, in ruling on a case in which the administration of a prison refused to organize a collective religious service for prisoners of the Islamic faith, while it did so for members of the official churches of the canton, the Federal Tribunal ruled that "the recognition of a religious community as an official church cannot be a criterion for the admissibility of collective divine service. In so far as that the decision to refuse Islamic prisoners the possibility of celebrating their prayers on Friday is based on the fact that the Islamic community does not enjoy public law status, it is contrary to article 50 of the Constitution."

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[216] See the statistics on refusal to serve in 1993 and 1994, established by the Federal Military Department.

[217] ATF 102 Ia 481.

[218] ATF 97 I 120.

[219] On this point, see the comments below on article 19 of the Covenant.

Paragraph 4

357. This paragraph is the counterpart of article 49, paragraph 3, of the Constitution and article 303 of the Civil Code, which stipulate that persons having parental authority or guardianship may, subject to the principle that no one may be forced to accept a religion, freely choose the religious education for children up to the age of 16 years, at which age the child has the right to choose his or her own religion.

358. In accordance with article 27 of the Constitution, the cantons are responsible for providing primary education in State schools. Such education must be free, compulsory and non-religious. State schools must also admit persons of all beliefs, without restricting their freedom of conscience and religion. The Federal Tribunal takes this non-religious requirement very seriously and has ruled that displaying the crucifix on the walls of public classrooms is contrary to article 27 of the Constitution.[220] Similarly, in a recent ruling, it accepted the recourse initiated by the father of a Muslim girl, who had been refused a dispensation by the cantonal authorities regarding her participation in swimming lessons (for boys and girls together), on the ground that no preponderant public interest prevailed over the private interest with regard to such a dispensation.[221] The public authorities follow the same line in ensuring that, as far as possible, parents and children may celebrate their religion together. However, since compulsory schooling is a civic obligation, a pupil may not cite freedom of conscience in order to be excused school,[222] given that the persons concerned can always choose education in a private school that matches their beliefs. Such schools are freely organized, in accordance with the constitutional freedom of trade and industry, and, as applicable, on the basis of freedom of conscience and religion. This does not exclude a procedure for cantonal authorization to ensure that the level of private education corresponds to the standard in state schools.[223] Finally, the non-religious nature of state schools does not hinder religious education based on the precepts of the dominant faith in the canton, but this must be optional.[224]

Article 19

Paragraph 1

359. In 1965, the Federal Tribunal ruled that freedom of expression was "an unwritten constitutional right of the Confederation".[225] Case-law incorporates in this right the freedom to form an opinion, to hold an opinion and to communicate it to others. Hence, for example, the Federal Tribunal ruled that a cantonal labour office could not deprive an insured person who fulfilled the necessary requirements of unemployment benefit on the ground that the person was a member of a prisoners' defence association. That was taken to be an indirect and unlawful punishment of an opinion protected by a fundamental right (ATF 109 V 276).

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[220] ATF 116 Ia 252.

[221] Decision of the Second Court of Public Law of the Federal Tribunal of 18 June 1993, in the case of A. and M. v. the Council of State of the Canton of Zurich (ATF 119 Ia 178).

[222] ATF 66 I 158. A recent decision rules that the dispensation regarding religious education must, however, be effective and that it is not in accordance with the Constitution to compel a pupil who has been excused biblical history lessons to remain in the room in which such teaching is given. Decision of the Second Court of Public Law of the Federal Tribunal of 19 January 1993.

[223] Cf. H. Plotke, "*Schweizerisches Schulrecht*" (Swiss school law), chap. 6, Paul Haupt Verlag, Bern, 1979.

[224] ATF 23 II 1368.

[225] ATF 91 I 485 and 96 I 586. In article 57, the Federal Constitution expressly grants the right of petition, which is applicable also to foreigners.

360. In the context of direct democracy, the right to form an opinion freely is of particular importance. It goes without saying that the public authority is not entitled to impose an opinion on an individual by any means. This is why the Federal Tribunal considers that the establishment of a State radio or television network is contrary to freedom of opinion[226] (with reference to the press, see below). Likewise, although the Tribunal accepts that a public authority may give its support to a particular opinion during a referendum campaign, it enjoins it to put forward only objective and scientific views and not to allocate more money to the campaign than is normally allocated by the rival groups.[227]

Paragraph 2

361. Like freedom of opinion, freedom of expression occupies a dominant place in Swiss constitutional order, as indicated by the following quotation from a decision of the Federal Tribunal: "but freedom of expression is not only, like other express or implicit freedoms in federal constitutional law, a condition of the exercise of individual freedom and an indispensable element for the development of the human person; it is also the basis of any democratic State: permitting the free formation of opinion, particularly political opinion, it is essential to the proper exercise of democracy. It thus deserves a special place in the catalogue of individual rights guaranteed by the Constitution and special treatment by the authorities."[228]

362. Freedom of expression protects all forms of communication between individuals, whether by oral, written or symbolic exchange (streamers, badges, etc.). It incorporates freedom of information (see below), as well as freedom of art and science. According to case-law, it applies only to the world of ideas. Any declaration that has a primarily commercial purpose is covered by the freedom of trade and industry (article 31 of the Constitution). Like freedom of opinion, it applies to everyone. However, it does not have the same absolute character and its use may be subject to special restrictions (on this point see below).

363. Freedom of expression includes freedom to receive and communicate information. It should be noted, in this regard, that article 55 of the Constitution expressly guarantees the freedom of the press and that article 55 *bis* protects the independence of radio and television, which must, however, faithfully present events and fairly reflect different opinions. To ensure the best possible compliance with these objectives, radio and television are subject to a concessionary regime, with concessions granted by the federal authority. This regime, which derogates from the principles of free competition, can be explained, above all, by the desire, in a small multilingual country, to have national programmes broadcast in the three official languages and to avoid an excessive concentration of the media in the hands of powerful groups. It does not imply any State intervention in the autonomy of the radio and television broadcasting enterprises. Any person who thinks that the radio or television networks have violated the obligation of objectivity may file a complaint with an independent recourse authority, and then with the Federal Tribunal, by means of the administrative law remedy (article 57 *et seq.* of the Federal Act concerning Radio and Television, dated 21 June 1991).

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[226] ZBl. 1982, p. 222.

[227] ATF 108 Ia 155.

[228] ATF 96 I 592, mentioned above.

364. Another right included in freedom of expression is that of "obtaining information from sources accessible to all".[229] The concept of "sources accessible to all" does not, unless there is an express legal rule to the contrary, include the records of the administration. The case-law in this area is in fact rather restrictive[230] and accepts a right to information only in four situations: if the information has been declared freely accessible, if it has been provided freely by the authority,[231] if the exercise of a political right is at stake, or if an individual is personally concerned by the document he or she seeks to consult.

Paragraph 3

365. In accordance with this paragraph, as well as article 10 of the European Convention on Human Rights, the only grounds for limiting freedom of expression are a legal basis and preponderant public interest. In general, the aim is to achieve a balance, sometimes a delicate one, between public interest in the maintenance of order and the private interests of the person involved but also the public interest in freedom of expression.

366. The Penal Code sets the following limits on freedom of expression:

Prohibition of calumny (article 303);

Prohibition of the violation of commercial secrets, of secrets in the private domain or relating to an office or of professional or military secrets (arts. 162, 179 and 179 *quater*, 320, 321 and 329);

Prohibition of misuse of the telephone (art. 179 *septies*);

Prohibition of public incitement to crime and violence (art. 259);

Prohibition of interference with the peace of the dead (art. 262) or dishonouring Swiss emblems (art. 270);

Prohibition on the representation of violence (art. 135);

Prohibition of violations of freedom of religion and worship (art. 261);

Prohibition of incitement to dereliction of military duty (art. 276);

Prohibition of subversive foreign propaganda (art. 275 *bis*);

Prohibition of insults to a foreign State or an inter-State institution (arts. 296 and 297);

Prohibition of racial, ethnic or religious discrimination (art. 261 *bis*, effective as from 1 January 1995).

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[229] ATF 108 Ia 277 and 107 Ia 305.

[230] There is a lot of criticism by legal writers, particularly by M. Rossinelli, "*Les libertés non-écrites*" (Unwritten freedoms), Payot, Lausanne, 1987, p. 163 *et seq*., and D. Barrelet, "*Droit suisse des mass média*" (Swiss law on the mass media), 2nd edition, Stämpfli, Bern, 1987, p. 44 *et seq*.

[231] Bound in this case by the principle of equal treatment (ATF 107 Ia 312).

367. Mention should also be made of provisions designed to protect honour (art. 173 *et seq.*) or to punish certain offences against sexual integrity (such as "hard core" pornography).

368. Article 28 *et seq.* of the Civil Code protect personal rights against unlawful attack, particularly in the press (right to compensation, provisional measures to prevent the attack, right of reply). In this connection it should be noted that the person accused of an attack against honour incurs no punishment if he or she can demonstrate that the allegations were true or that he or she had serious reason to believe them to be true (art. 173, para. 2, of the Penal Code). This provision also protects freedom of expression and the press against improper prosecution.

369. The freedom of expression of foreigners is subject to specific restriction. Pursuant to the decree of the Federal Council dated 24 February 1948 concerning political speeches by foreigners, foreigners who do not have an establishment permit[232] may speak on a political subject, at public or private meetings, only with special authorization. Such authorization will be refused if there are grounds to fear that the country's internal or external security may be endangered or that public order may be disturbed. Foreign speakers must abstain from any interference in internal political affairs.

370. Prisoners may also avail themselves of freedom of expression and of the right to receive information from sources that are generally accessible, provided that and in so far as prison security and order are not affected thereby. They thus have the right to have pre-sealed radio and television sets and to obtain newspapers.[233] Prisoners in pre-trial custody may have their correspondence restricted if there is a risk of collusion[234] but, as a general rule, the checks must be less strict because of the presumption of innocence.[235] Letters that may facilitate escape or the commission of new crimes may be intercepted. The same applies to letters that threaten order in the prison.[236] In a recent case, the Federal Tribunal ruled that a prisoner could not be prevented from sending to journalists and the non-governmental organization Amnesty International letters or a video cassette in which he complained about the conditions of detention, regardless of the truthfulness of the allegations. However, defamatory or insulting statements may be censored.[237]

371. According to the case-law of the Federal Tribunal, use of the public domain to disseminate an opinion may "if, by its nature or intensity, it exceeds the usual bounds",[238] be subject to prior authorization by the cantonal or federal authorities, even if there is no express legal basis therefor. The authorities must take account of the principles of equal treatment and proportionality, as well as all the interests involved, giving particular weight to those that are protected by fundamental rights.[239]

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[232] This permit is generally granted only after continuous residence on Swiss territory for several years. Cf. comments above on article 12 of the Covenant.

[233] ATF 102 Ia 279.

[234] ATF 117 Ia 465, see also the comments above on article 10 of the Covenant.

[235] ATF 106 Ia 281.

[236] ATF 99 Ia 262.

[237] Federal Tribunal decision of 24 February 1993, ATF 119 Ia 74.

[238] ATF 105 Ia 93.

372. Persons in special legal situations must exercise a certain reserve in the use of their freedom of expression, without prejudice to the principle of proportionality. This applies, for example, to civil servants, judges and lawyers. In particular, the Federal Tribunal expects judges to be circumspect in their public statements, particularly concerning cases pending and the circumstances surrounding them. This relates to the impartiality of the courts.[240] Conversely, members of parliament have absolute immunity regarding opinions expressed in the framework of their mandate (article 2 of the Federal Law of 14 March 1958 on the Responsibility of the Confederation).

373. In the context of the job contract, an employee is, in principle, protected against dismissal based on the expression of an opinion (article 236 of the Code of Obligations provides for compensation for unfair dismissal). In practice, it must be acknowledged that it will often be difficult to demonstrate that this is the true reason for the termination of the contract.

374. Article 10 of the European Convention on Human Rights also protects freedom of opinion and expression and any person who feels that such freedom has been infringed may make reference to that Convention.

Article 20

375. When Switzerland ratified the Covenant, it reserved the right not to adopt further measures to ban propaganda for war and the right to adopt a criminal provision which would take account of the requirements of article 20, paragraph 2, on the occasion of its forthcoming accession to the 1965 Convention on the Elimination of All Forms of Racial Discrimination.

376. The first reservation was based on the following considerations. In its General Comment 11 (19), the Committee on Human Rights noted that, in order for article 20 to be fully effective, it would be necessary for a law to indicate clearly that the propaganda and advocacy described therein were contrary to public order and to lay down an appropriate penalty for any violation. Switzerland does not have such a formal law. However, this certainly does not mean that there is no criminal punishment for propaganda for war, particularly in the provisions of titles 13 and 16 of the Penal Code (crimes and offences against the State and national defence; crimes and offences liable to compromise relations with other countries). Therefore, acts constituting "propaganda for war" are punishable under Swiss law when they reach a certain threshold of seriousness. However, the formulation of the above-mentioned criminal provisions does not make bellicose utterances, however dishonourable they may be, punishable when they do not endanger the State or relations with other countries. In a direct democracy, these are the requirements of freedom of expression, without which there is no real democracy.

377. As far as freedom of expression is concerned, with reference to propaganda for war it may be restricted in accordance with article 5 and article 19, paragraph 3, of the Covenant.

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[239] ATF 107 Ia 294. See also the comments below on article 21 of the Covenant.

[240] ATF 108 Ia 172.

378. It may also be mentioned that at the moment there is not really any commonly accepted definition of the concept of "propaganda", as used article 20.[241] This supports the view of the Swiss Government, that it would be difficult to define the concept in criminal law and to distinguish the elements constituting an offence. In case of need, the "general police power"[242] would enable the federal and cantonal authorities to impose more severe penalties for propaganda acts that threaten peace.

379. The Federal Council considers that Swiss law complies with the requirements of article 20, paragraph 1, of the Covenant, whose purpose can only be to punish abuse of freedom of expression or freedom of association. This is why, considering the risks and difficulties that it could imply, the Federal Council reserves the right not to adopt new measures of a general nature designed to prohibit propaganda for war.

380. The very formulation of the second reservation indicates that it is a temporary one. The new article 261 *bis* of the Penal Code and article 171c of the Military Penal Code both punish racial discrimination by imprisonment or fines. They will probably come into force on 1 January 1995 (in this connection, see the comments above on article 2 of the Covenant). Acceptance of this penal reform will make it possible to ratify the 1965 Convention on the Elimination of All Forms of Racial Discrimination. This reservation will then be withdrawn immediately.

Article 21

381. In the Swiss legal order, the right of peaceful assembly is an unwritten constitutional right, recognized by the Federal Tribunal in 1970,[243] and is an important constituent of the democratic system. This right is also incorporated in article 11 of the European Convention on Human Rights and it is guaranteed regardless of the nature of the opinions expressed (subject to certain limitations of a penal nature mentioned below) and includes the right to call a meeting, to organize a meeting, to participate in a meeting or to abstain from participating in a meeting. This right applies not only to Swiss nationals, but also to foreigners, with a limitation on meetings of a political nature, in which they may only speak if they have been authorized to do so (on this point, see the comments above on article 19 of the Covenant).

382. The main distinction that should be made between the types of meetings relates to the place where they are held: whether indoors or in the public domain. Since meetings of the latter type are far more likely to disturb public order and involve increased use of the public domain, they may be subject to greater limitations than the former, or they may be made subject to authorization.

383. The right to hold meetings on private premises or private land is limited only by police requirements regarding the disturbance of the peace at night or respect for the neighbourhood, as well as the property rights of third parties. Meetings that jeopardize the constitutional order (in the sense of article 275 of the Penal Code) or relations with foreign States (in the sense of article 296 *et seq.* of the Penal Code) may also be prohibited or sanctioned. However, case-law makes it clear that the mere expression of views, even if they are revolutionary, must be tolerated.[244]

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[241] On this point, M. Novak "*CCPR-Kommentar*" (Commentary on the Covenant on Civil and Political Rights), Engel Verlag, Kehl am Rhein, 1989, p. 385.

[242] On this point, see the comments below on article 21 of the Covenant.

[243] ATF 96 I 218.

384. According to case-law, meetings involving an increased use of the public domain (this is taken to be use that prevents or limits the normal circulation of the public, cf. ATF 100 Ia 392) may also be subject to prior authorization by the cantonal authorities, even if there is no express legal basis therefor.[245] Since the State has the task and the power to ensure the normal use of the public domain,[246] it is within its rights to regulate the use thereof by means of its general police power.[247] However, the authorities may not refuse authorization for a meeting on the public highway. Their power of assessment is limited by the requirement to take objective account of the importance of freedom of assembly which, without conferring the right to use the public domain at a specific place and at a specific time, confers a certain right of requisition when its exercise so requires.[248] Moreover, the Federal Tribunal has laid down that freedom of assembly on the public domain may be limited only if the exercise thereof objectively creates a direct and imminent danger to public order.[249] In particular, mere opportuneness is not deemed sufficient grounds to prohibit a meeting, and in no event may the authorization procedure be used as a form of prior censorship.[250]

385. The system of prior authorization must also be applied with flexibility, particularly in the case of spontaneous peaceful demonstrations, which must not be dispersed with force merely because they have not been authorized.[251] The principle of proportionality also requires that an authorization should not be refused, but rather be subject to certain conditions designed to avoid any danger to public order. The authority must, however, not make the granting of an authorization subject to conditions if the problems that are likely to arise during a meeting can be avoided by other appropriate measures, above all police supervision. The extent of the supervisory measures must be in reasonable proportion to the interest of holding the meeting.

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[244] ATF 58 I 84.

[245] ATF 100 Ia 392. However, this is not the case of meetings in a hall or on private property: ATF 107 Ia 300.

[246] It should be specified here that the cantonal legislators have, in general, fixed such legal basis in a fairly precise manner, albeit in texts that often have only an indirect reference to freedom of assembly (such as cantonal or communal regulations governing the use of the public domain or the maintenance of public order). The Law on Contraventions of the Canton of Basel-Town lays down, for example, that only processions that involve more than 60 persons or are more than 30 metres in length, as well as other meetings on the public highway (assemblies or demonstrations), are subject to prior authorization by the cantonal Department of Justice. There is certainly insufficient space in this report for an exhaustive description of the legislation on this subject in each canton.

[247] In Swiss law, the "general police clause" enables the authority to issue specific orders or decisions in the absence of a legal basis, when the security of the State, property or persons is clearly threatened. Its application is restrictive and the authority may only have recourse to it as *ultima ratio* if adequate measures cannot be taken on the basis of existing law. As regards the use of the public domain, in particular, recourse to this clause is justified by the fact that it is scarcely possible to foresee all causes of disturbance in an abstract and indeterminate manner.

[248] ATF 105 Ia 480, ATF 105 Ia 21.

[249] ATF 107 Ia 226, ATF 108 Ia 300.

[250] ATF 99 Ia 693 and 96 I 590.

[251] On this point, G. Malinverni, "*La liberté de réunion*" (Freedom of assembly), Geneva, 1981, p. 148 *et seq.*

386. The authority's task is far from simple, since the authority must often forecast how a meeting will develop when assessing whether a meeting is likely to jeopardize public order. Here again the principle of proportionality requires that any restriction must be based on serious reasons to believe that public order is threatened.

387. The principle that a measure must, in general, be applied to the party actually responsible for disturbing public order means that except in a case of necessity, a meeting should not be prohibited on the grounds that it is likely to be disturbed by outside elements. The problem is particularly acute with regard to counter-demonstrations. While it is possible, in order to prevent violence, to prohibit a demonstration and a counter-demonstration, account must none the less be taken, in the interests of equality of treatment, of the mutual interests of the demonstrators in order to ensure that one group may not announce a counter-demonstration merely to cause prohibition of the other group's demonstration.[252]

Article 22

1. General

388. Pursuant to article 56 of the Constitution, "Citizens have the right to form associations, provided that the purpose of these associations or the means they use are not unlawful or dangerous to the State. Cantonal laws shall make the necessary provision for the prevention of abuses."

389. Historically, freedom of association was conceived primarily to guarantee the free formation of political parties. This remains one of its major functions, along with the protection of the right to form trade unions. Today, freedom of association is also protected in Switzerland by article 22 of the present Covenant, article 8 of the International Covenant on Economic, Social and Cultural Rights, article 11 of the European Convention on Human Rights and, with reference to trade unions, ILO Convention No. 87.

2. Titularity of the right

390. The associations protected by article 56 of the Constitution must have a purpose in the realm of ideas (in the broadest sense). Those whose aim is to make a profit are covered by article 31 of the Constitution, guaranteeing freedom of trade and industry. They may thus be subject to the limitations relating thereto (art. 31 *et seq.* of the Constitution). Religious associations are covered by freedom of conscience and belief (art. 49 of the Constitution) and freedom of worship (art. 50 of the Constitution), which are special provisions in relation to freedom of association (see the comments above on article 18 of the Covenant).

391. The Swiss Civil Code of 10 December 1947 governs all aspects of the establishment, organization and dissolution of non-profit-making associations having legal personality[253] (these are "associations" in the narrow civil law sense — other non-commercial associations that cannot acquire legal personality are treated in the same way as simple societies governed by the Code of Obligations). As mentioned above, commercial companies may not avail themselves of freedom of association, but are covered by freedom of trade and industry. They may take the form of simple societies (article 530 *et seq.* of the Code of Obligations), general partnerships (article 552 *et seq.* of the Code), limited partnerships (article 594 *et seq.* of the Code), partnerships limited by shares (article 764 *et seq.* of the Code), private limited liability companies (article 772 *et seq.* of the Code) or, in most instances, public limited companies (article 620 *et seq.* of the Code). Only cooperative societies, pursuant to article 828 *et seq.* of the Code, may invoke freedom of association, since they are essentially non-profit-making.

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[252] ATF 103 Ia 314.

[253] Article 60, paragraph 1, of the Civil Code reads as follows: "Political, religious, scientific, artistic, charitable, recreational or other associations that have no economic purpose acquire personality when they express in their statutes the desire to be organized corporatively".

392. The Constitution excludes from the field of protection associations whose purpose or means are unlawful or dangerous to the State. Whereas unlawfulness relates to the fundamental legal rules in force, the concept of danger to the State is more vague and its use could lead to abuse. However, the decisions of the Federal Tribunal indicate that only associations that set out to impose their views by means other than peaceful and democratic means must be prohibited.[254] In such cases, the prohibition complies with article 17 of the European Convention on Human Rights and article 5 of the Covenant. It should be added that article 275 *ter* of the Penal Code punishes the establishment of associations that are dangerous to the State. Article 56 of the Constitution sets out that it is incumbent on the cantonal authorities to take steps to deal with unlawful or dangerous associations. It is, however, accepted that associations that are dangerous to the federal State may be the subject of measures adopted by the federal authorities. In the case of associations in the sense of article 60 *et seq.* of the Civil Code, article 78 of the Civil Code lays down that they shall be dissolved by a judge if their purpose is unlawful or immoral (article 88, paragraph 2, sets out the same rule for foundations in the sense of article 80 *et seq.* of the Code). We can thus draw the following general rule: although the political authorities may prohibit an association, it is for the civil judge to pronounce its dissolution. Commercial companies are subject to the rule in article 20 of the Code of Obligations, whereby the civil judge shall nullify any contract with an impossible, unlawful or immoral object.

393. According to the jurisprudence of the Federal Tribunal, only individuals may avail themselves of freedom of association.[255] Associations established in accordance with article 60 *et seq.* of the Civil Code may none the less also unite to form federations or confederations which, in turn, constitute associations that qualify unrestrictedly for the same constitutional and legal guarantees as first-degree organizations. One should make the following distinction. Private-law bodies corporate may, according to the literature, initiate recourse, in their own name, against a decision that limits the freedom of association of their members, or hinders their statutory activities or their right to form a federation. Public-law bodies corporate enjoy no freedom of association.

394. Although article 56 of the Constitution refers only to citizens, it applies also to foreigners, except with reference to political associations, in which area they may be subject to greater restriction than Swiss nationals (on this subject see the comments above relating to article 19 of the Covenant).

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[254] ATF 100 Ib 18. The principle of proportionality applies: the measures will be more or less severe depending on the nature and seriousness of the unlawfulness or danger. The use of certain unlawful means may, for example, be punished only by a fine. However, if the purpose or if all the means used are vitiated, the association will be prohibited. See J.-F.Aubert, "*Traité de droit constitutionnel suisse*" (Treatise on Swiss constitutional law), vol. II, Neuchâtel, 1967, p. 753.

[255] ATF 100 Ia 286 and 97 I 121.

3. The rights that are guaranteed

395. Freedom of association includes the freedom to form an association, belong to an association, carry on activities within an association, dissolve an association, abstain from being a member of an association and leave an association freely. These constitutional principles are reiterated and specified in the relevant provisions of the Civil Code (with regard to "associations in the narrow sense" and foundations).

396. There are some professional associations in which federal or cantonal public law may impose compulsory participation (associations of doctors, notaries, advocates, etc.). The Federal Tribunal accepts that this is compatible with article 56 of the Constitution. It considers that, in so far as these professional associations are politically neutral, compulsory participation is, above all, designed to facilitate the application of economic and police rules governing the profession and that their constitutionality should be judged with reference to freedom of trade and industry. It has ruled that participation in a student association may not be made compulsory unless the association is politically neutral.[256]

397. From the decisions, the following rules may be derived: article 56 of the Constitution does not confer the right of admission to an association against the will of its members, even if the situation causes economic prejudice to the applicant.[257] However, an individual does have some protection against unjustified exclusion. The individual has the right to be heard in advance, even if the statutes of the association allow for exclusion without specified grounds.[258]

398. Limitations on freedom of association must, as in the case of any individual freedom, be set out in the law, be designed to safeguard public order and respect proportionality. The principle of proportionality is the basis on which the Federal Tribunal declared the requirement of prior authorization to form an association to be unconstitutional.[259]

4. Serving military personnel and officials

399. In principle, a federal or cantonal official has full entitlement to public freedoms, particularly freedom of expression and association. In particular, an official may carry on an activity in a political organization, even if the organization is critical of the authority in power or supports a change of regime, provided that it advocates peaceful and legal means.[260] Owing to their status and their duty of allegiance, serving military personnel and officials must, however, tolerate the exercise of some of their freedoms being subject to specific restrictions designed to ensure that their actions or statements do not cast doubt on the impartiality of the administration. Article 11, paragraph 2, of the European Convention on Human Rights expressly indicates this, while article 22, paragraph 2, of the Covenant only mentions this possibility with regard to members of the armed forces and police.

400. Thus, the Confederation and the cantons have laws governing the status of officials which all lay down a duty of allegiance and respect for the secrecy of the office, while reiterating the constitutional guarantee of freedom of association.[261] With particular reference to military personnel, item 243 of the Service Regulations (distributed to all citizens required to do military service) restricts the exercise of the political freedoms of expression and association during periods of service.

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[256] ATF 110 Ia 36.

[257] ATF 86 II 365.

[258] ATF 85 II 543 and 90 II 347.

[259] ATF 96 I 229.

[260] ATF 99 Ib 138.

401. In practice, the scope of the admissible limitations will depend on the rank of the official concerned. In general, the Federal Tribunal accepts that an official shall cease to exercise his or her functions if his or her membership of a political group raises doubts regarding his or her reliability and if there are good reasons to fear that such membership causes the official to violate his or her duties or the secrecy of the office.[262]

402. Until 1986, officials could not belong to associations formed for professional protection which envisaged or used strikes (see the comments below under section 6, "Trade union freedom". This prohibition no longer applies today.

5. Political parties and associations

403. In the Swiss democratic system, freedom of political association has a decisive role. The political parties are therefore in the forefront in qualifying for the guarantees set out in article 56 of the Constitution. At federal level there are about 16 parties, ranging from the left to the right of the political spectrum.

404. We have to go back to the troubled times of the Second World War to find instances of political parties being prohibited on the grounds that they were dangerous. The Federal Council banned the Communist Party in 1937 and the so-called "frontist" parties in 1940. During the same period, the Federal Tribunal accepted that the canton of Zurich could prohibit the formation of groups of a paramilitary nature and that the canton of Neuchâtel could ban the Communist Party.[263] It is worth repeating that, today, such a measure could be applied only to the formation of a group setting out to impose its ideas outside the democratic process.

6. Trade union freedom

405. Article 56 of the Constitution also guarantees trade union freedom, that is to say the right for the social partners to establish associations to protect their interests and to safeguard their working conditions. This freedom is also specifically guaranteed by ILO Convention No. 87, article 11 of the European Convention on Human Rights and, henceforth, article 22 of the present Covenant and article 8 of the International Covenant on Economic, Social and Cultural Rights.

406. The Swiss Trade Union Association, the Confederation of Swiss Christian Trade Unions and the Federation of Swiss Staff Associations are the basic organs representing most of the trade unions in Switzerland. The proportion of unionized workers to total workers, as set out in the comparative table produced by OECD (published in "Employment Outlook", July 1992), has ranged from 30 per cent to 35 per cent over the last 30 years.

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[261] By way of example, see articles 13, 22, 24, 25 and 28 of the Federal Law containing the Regulations on Public Officials, dated 30 June 1927, annexed.

[262] ATF 99 Ib 138.

[263] ATF 60 I 349 and 63 I 281.

407. There are also employers' organizations. The Central Union of Swiss Employers' Associations represents 34 professional associations and 37 regional associations.

408. The rights connected with trade union freedom are, principally, the right to conclude collective labour agreements and the right to strike. Collective labour agreements, governed by article 356 *et seq.* of the Code of Obligations, may be concluded between one or more employers, whether or not they are organized, and one or more workers' organizations. Only the workers have to be organized in order to be able to conclude collective labour agreements. Some collective labour agreements may nevertheless become binding on organizations that have not signed them. Thus the working conditions fixed in a collective labour agreement may be extended, in a given branch, to cover the territory of a canton (extension pronounced by the government of the canton in question and approved by the Federal Council), a number of cantons or all of Switzerland (extension pronounced by the Federal Council). Once a collective labour agreement has been extended, it is binding for the duration of its extension. However, few of the collective labour agreements concluded in Switzerland have been extended in this way.

409. Workers have no personal right to be engaged and therefore have no protection, before they are taken on, against acts of discrimination by an employer which could impair their trade union freedom. When there is an employment relationship, private sector workers are protected against such acts in respect of their trade union activities in compliance with the law. This protection arises from the general protection of human rights, based on article 28 of the Civil Code. Workers also qualify for a special protection provided for in the Code of Obligations (art. 336, para. 2 (a)), under which the termination of a job contract is improper if the worker's employment is terminated because of the worker's membership or otherwise of an organization, or because of the lawful exercise of trade union activity. In addition, according to the Code of Obligations, agreements that compel workers to join an organization that has signed a collective labour agreement are null and void.

410. However, there is no constitutional or legislative provision that specifies the conditions for a strike to be legal. Case-law[264] indicates the following criteria:

> The strike must be organized and only one or more workers' organizations may participate in it, on the understanding that they are also in a position to terminate the strike by the conclusion of a collective agreement (a "wildcat strike" launched by a spontaneous movement of non-organized workers, is therefore unlawful);
>
> The strike must not be designed to further existing legal claims, in respect of which only the courts or joint arbitration organs are competent (the aim of the strike must therefore be the establishment of new regulations on working conditions that may be set out in a collective labour agreement);
>
> The strike must respect the principle of proportionality between the objectives and the means used; it must not be politically inspired;
>
> The strike must not disturb relative labour peace (art. 357a, para. 2, of the Code of Obligations) or an absolute labour peace agreement. There are two types of labour peace: firstly, relative peace, which prohibits recourse to industrial action in respect of any matter governed by a collective labour agreement (article 357a, para. 2, of the Code of Obligations) and, secondly, absolute peace, which offers the social partners the possibility of incorporating in their collective agreement an absolute ban

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[264] See, for example, ATF 111 Ia 245.

on the use of industrial action, even in respect of matters not dealt with in the agreement (same article).

411. If these conditions are not fulfilled, a strike is justification for the immediate termination of the strikers' job contracts, as well possible damages. Statistics on the number of strikes and lockouts between 1975 and 1991, along with the number of enterprises and employees concerned and working days lost, are annexed. In 1992, three strikes affected 18 enterprises and 220 workers, causing the loss of 673 working days. The large number of labour peace agreements has meant that conflicts are relatively rare and there is little judicial precedent. It may also be noted that the right to strike is generally denied to workers in managerial posts, as well as public officials. Federal officials may therefore neither go on strike nor encourage their colleagues to do so. Officials who contravene this prohibition are liable to disciplinary penalties that may even include dismissal (in this connection see, for example, articles 13, 23 and 62 of the Federal Law containing the Regulations on Public Officials, annexed). At cantonal level, legislation generally bans officials from going on strike. It seems that only the Canton of the Jura envisages the right to strike for certain categories of officials. The status of federal officials is currently being entirely revised and this may lead to a change in the current situation.

7. Associations to protect human rights

412. Such associations are subject to the common regime described below. They may therefore be freely formed, without prior authorization, provided that their aims or the means they use are not unlawful or immoral. They generally take the form of foundations or "associations" in the sense used in the Civil Code. Not only are associations involved in the protection of human rights tolerated, but the authorities also encourage their activities, mainly by subsidies. At federal level, the Human Rights Section of the Federal Department of Foreign Affairs has an allocation that it distributes to a number of non-governmental organizations and institutions involved in the protection of human rights.

Article 23

Paragraph 1

413. In Switzerland, the family is acknowledged to be the fundamental unit of society and enjoys State protection on the basis of articles 54 and 34 *quinquies* of the Federal Constitution, as well as articles 12 and 8 of the European Convention on Human Rights. In this connection, for a definition of the concept of a "family", see the comments above on article 17 of the Covenant.

414. In its general comment 19 (39), the Committee requests detailed information on measures adopted by the State on behalf of the family. Although it is impossible, within the framework of this report, considering the federal structure of the country, to give an accurate and exhaustive picture of the provisions in force at all levels in the federal structure, the following observations are designed to give an overview of Swiss family policy.[265]

415. Article 34 *quinquies* of the Constitution, introduced in 1945, enjoins the federal State to take account of the needs of the family and gives it competence with regard to family allowances and maternity benefits. The laws of the cantons and some cantonal constitutions also contain provisions to protect the family. In this field, the tasks are divided among the Confederation, the cantons and the communes, with the latter frequently responsible for social action to assist the family (crèches, kindergartens, family assistance services, etc.).

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[265] The initial report of Switzerland on the Covenant on Economic, Social and Cultural Rights, particularly article 10 thereof, will give further information.

416. Switzerland's family policy is not a population policy, based on considerations of a demographic nature. It is based on considerations of social justice: it recognizes the family's contribution to society and is designed to provide the family with assistance to correct the distribution of income. This is done by offsetting family expenses primarily by means of family allowances (allowances for children, allowances for occupational training and allowances for the household, marriage, births and secondary dependants). The system and the beneficiaries may vary from one canton to another, but the benefits are in principle paid to the parent who carries on a money-earning activity, regardless of whether or not the parents are married (with the exception, naturally, of the marriage allowance) or live together, as well as fiscal allowances (at the federal and cantonal level).[266]

417. Mention should also be made of some social security services, such as the income supplement paid to pensioners or disabled persons with dependent children, payments to orphans or unemployment benefit supplements for persons who are married or are assimilated to them. Article 34 *quinquies* of the Constitution establishes a maternity benefit, and a law to put this into effect is under consideration. However, some cantons (Saint Gallen, Schaffhausen, Zurich, Zug, Lucerne, Fribourg, Glarus, Vaud and Graubünden) already have maternity services.[267]

418. In hardship cases, families must be able to approach advisory centres for information and guidance. Pursuant to the Federal Act concerning Pregnancy Advisory Centres, dated 9 October 1981, the cantons have set up family planning and advisory offices which may be approached free of charge. Furthermore, article 171 of the Civil Code enjoins the cantons to provide couples with an (optional) advisory office to deal with any problems that arise in their life together or in their role as parents. The pre-draft revision of the Civil Code envisages, in connection with divorce law, that the cantons should ensure that the spouses have access to mediation offices offering assistance on divorce and its repercussions.

419. The Federal Administration has a "centre for family matters", mainly responsible for tasks linked with federal or cantonal family allowances and family policy. In this brief overview, mention must also be made of the role of many private associations working to promote the family, principally the Swiss Pro Familia Suisse, Pro Juventute, the Popular Movement for Families, the Swiss Federation of Parents' Organizations, the Swiss Forum of Parents' Organizations and the Swiss Federation of Single-Parent Families. Some associations receive State subsidies.

Paragraphs 2 and 3

420. The provisions embodied in these two paragraphs reflect the principles in article 54 of the Constitution, as set out in article 86 *et seq.* of the Civil Code. As a rule, the institution of marriage has five basic features in Swiss law: monogamy, heterosexuality, exogamy, initial mutual consent and celebration according to the forms indicated in civil law. The Civil Code therefore thus the following conditions for a marriage to be valid:

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[266] An explanation of the division of federal and cantonal competence with regard to family allowances and the different types of allowances established by the cantons will be given in the report by Switzerland on the Covenant on Social, Economic and Cultural Rights.

[267] These matters will also be dealt with in the report mentioned in the preceding footnote.

(a) Minimum age of 20 years for men and 18 years for women. However, as an exception, the cantonal government of the place of domicile may authorize a woman aged 17 years or a man aged 18 years to enter into marriage, with the agreement of the parents or guardians (art. 96 of the Civil Code). Since the coming of age under civil law is currently set at 20 years, a marriage celebrated before that age is deemed to render the person involved of age (emancipation by marriage, art. 14, para. 2, of the Civil Code). Such a marriage requires the agreement of the parents or the guardian (art. 98 of the Civil Code). A plan to lower the age of civil majority to 18 years has been approved by Parliament. When it is adopted it will harmonize the minimum age for marriage of both sexes and eliminate the possibility of emancipation for women at the age of 17 years.

(b) Discernment and the absence of mental illness (article 97 of the Civil Code)

The discernment requirement arises from the rules regarding the exercise of civil rights (see the comments above on article 16 of the Covenant). The Federal Tribunal has stressed that it must not be interpreted too narrowly, so as to avoid unjustified hindrance of freedom to marry. In a 1983 decision, the Tribunal went so far as to state that the marriage must be celebrated if it does not seem to prejudice the party concerned, regardless of any doubts that one may have regarding the discernment of an intended spouse.[268] As regards the precondition of the absence of mental illness, the recent approach has been one of restrictive interpretation: only illnesses depriving a person of discernment could prevent the marriage of that person.[269] The condition therefore merges with that of discernment, to which it seems to add nothing. This view seems fair, considering the basic nature of freedom to marry. However, it does not seem to have been confirmed as yet by the Federal Tribunal which, admittedly in rulings that date back many years, states that "Any person suffering from a mental illness is unable to enter into marriage, even if the person is capable of discernment".[270] The pre-draft revision of the Civil Code envisages the abandonment of this absolute impediment for persons suffering from mental illness.

(c) The consent of the legal representative of a person under legal disability (art. 99 of the Civil Code)

Since such a person cannot exercise civil rights, this consent is necessary. In order to prevent abuse, the law envisages a right of recourse to the supervisory authorities against refusal by the legal representative who is responsible for protecting the interests of the person in question, particularly the person's right to freedom to marry.

(d) Absence of impediment to the marriage

The Civil Code prohibits marriage between direct-line relatives,[271] whether the relationship is one of filiation or adoption (in the latter case, with a possible derogation by decision of the cantonal government of the place of domicile) (art. 100 of the Code). In order to enter into marriage it is also necessary to prove that any preceding marriage has been dissolved (requirement of monogamy, art. 101 of the Code). Two other impediments to marriage are now without effect in practice. The first is the 300-day waiting period imposed on a woman after dissolution of a marriage before entering into another (art. 103 of the Code). This rule, which had been designed to avoid any conflict of paternity between two successive husbands, is no longer relevant, since article 257 of the Code now gives priority to the presumption of paternity of the second husband. The second case is the application of article 104 of the Code, permitting the divorce judge to forbid a spouse to remarry for a certain period, which led to a ruling against Switzerland by the European Court of Human Rights for violation of the right to marry.[272] This provision has since been a dead letter and will shortly be eliminated, along with the waiting period laid down in article 103 of the Code, as part of the revision of the divorce law.

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[268] ATF 109 II 273.

[269] In this connection, O. Guillod, "*La liberté de se marier*" (Freedom to marry), in *Présence et actualité de la Constitution dans l'ordre juridique*, Basel, 1991, p. 97 *et seq.*, particularly 110-111.

[270] ATF 73 I 167.

[271] The pre-draft revision of the Civil Code removes the impediment of marriage between an aunt and a nephew or an uncle and a niece.

(e) Compliance with the conditions of form set out in article 105 *et seq.* of the Civil Code

These conditions deal with the publication of the banns, the time-limits to be respected, the form of the celebration of marriage, etc. After the civil marriage has been celebrated, the registrar gives the spouses a marriage certificate, without which the religious blessing of the union cannot take place (art. 118 of the Civil Code).[273] These conditions of form will be simplified in the forthcoming revision of the Civil Code.

421. The constitutional freedom to marry implies the freedom not to marry. In addition, articles 91 (which provides that there is no right of action to oblige a betrothed party to marry) and 124 (which makes the absence of consent just cause to nullify a marriage) of the Civil Code reflect the importance of the free consent of the spouses. There is also nothing to prevent couples from choosing to live together unmarried.

422. The law does not, however, give special status to couples and families living in a free union. This has an impact on filiation, which exists as a matter of course between a mother and her child (according to the adage "*mater semper certa*", art. 252 of the Civil Code). In contrast, filiation is established with reference to the father only by his marriage to the mother, recognition, adjudication or adoption (art. 252, paras. 2 and 3, of the Civil Code).

423. Although, as already mentioned, cohabiting partners are treated as married persons for the purposes of most family allowances, this is not the case in other areas. As regards taxation, for instance, although equality of treatment for cohabiting partners (taxed separately, as single people) and married couples (taxed jointly, provided that they do not live apart) cannot be achieved, the Federal Tribunal has postulated that married couples should not pay more tax than cohabiting partners, the opposite being possible in so far as the tax system is not systematically unfavourable to cohabiting partners.[274]

424. With regard to foreigners who, naturally, also qualify for the guarantee in article 54 of the Constitution and article 12 of the European Convention on Human Rights, article 44 of the Federal Act concerning International Private Law, dated 18 December 1987, lays down that, in principle, the basic conditions of the marriage are governed by Swiss law but, if these conditions are not fulfilled, it is then sufficient for those set out in the national law of one of the intended spouses to be fulfilled for the marriage to be celebrated. A marriage that has been validly celebrated abroad is recognized in Switzerland (art. 45 of the same Act).

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[272] European Court of Human Rights, case of F. v. Switzerland, decision of 18 December 1987, Series A 128.

[273] The civil law does not govern the religious marriage, which is unrestricted.

[274] ATF 118 Ia 1.

425. It should also be mentioned that any contractual promise to remain celibate, not to have children, etc., are nullified by the provisions of the Code of Obligations on the object and nullity of contracts (arts. 19 and 20 of the Code of Obligations).

Paragraph 4

426. The equality of the spouses during marriage arises from the constitutional principle of equality of men and women.[275] Thus, article 4, paragraph 2, of the Constitution expressly lays down that the law provides for equality in the areas of the family, education and work. This legislative mandate served as a guide for the recent amendment to the law governing the general effects of marriage and succession (amendment to the Civil Code, effective since 1 January 1988), and the divorce law is undergoing revision.

427. By marriage and during the conjugal union:

> In principle, the family name is that of the husband, but the wife may keep her name and use it before the family name (art. 160 of the Civil Code). Pursuant to article 30 of the Civil Code, the intended spouses may be authorized, at their request and if they can show legitimate interest, to use the wife's name as the family name. In such cases, the husband used not to be authorized to keep his name and to use it before the family name. Thc European Court of Human Rights recently ruled that this was unfair treatment and incompatible with the European Convention on Human Rights.[276] The Order on Civil Status of 1 June 1953 was recently amended to take account of this judgement.
>
> The wife assumes her husband's cantonal citizenship without losing her own (the previous system of unity of cantonal citizenship had caused inequalities, particularly when the wife carried on a political activity) (art. 161 of the Code).
>
> The spouses together choose the joint home and represent the conjugal union on a basis of full equality (arts. 162 and 166 of the Code).
>
> The husband and wife both contribute, within their capabilities, to the maintenance of the family (art. 163 of the Code).
>
> The legal conditions governing matrimony (sharing of acquisitions, community of estate or separation of estates) respect the equality of the spouses.
>
> "Parental authority" is exercised during marriage by both spouses (art. 296 *et seq.* of the Code), who jointly administer the property of their child (art. 318 of the Code), select its forename together (art. 301 of the Code) and supervise its education (art. 302 *et seq.* of the Code).

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[275] See the comments above on article 3 of the Covenant.

[276] European Court of Human Rights: case of Burghartz v. Switzerland, decision of 22 February 1994, Series A 280B.

> The Federal Law on the Acquisition and Loss of Swiss Nationality has been amended to guarantee equality of treatment for a foreign man who marries a Swiss woman and a foreign woman who marries a Swiss man. The new provisions came into force on 1 January 1992.[277] Henceforth, the foreign spouse, regardless of sex, qualifies for facilitated naturalization after a total stay of five years in Switzerland (including the year preceding the application) and three years in the conjugal home.

428. Regarding equality of spouses at the dissolution of marriage due to death, the provisions in book 3 of the Civil Code make no distinction between the spouses.

429. Where the marriage is dissolved by divorce, the current law dates from the beginning of the century and still includes some inequalities between men and women. However, it is currently being revised in accordance with the requirements of article 4 of the Constitution. The main focus of the revision relates to judicial divorce, the "de-penalization" of the divorce law, encouragement to the spouses to settle their divorce amicably, the best protection of the interests of the children and fair settlement of the economic consequences of the divorce.

430. As an example, in 1991 there were 13,627 divorces in Switzerland, or two per 1,000 inhabitants. In that year, the statistics for the number of divorces per 10,000 marriages, broken down according to the length of the marriage, gives the following picture:

After 0 to 4 years of marriage	150.8
After 5 to 9 years of marriage	184.5
After 10 to 14 years of marriage	127.9
After 15 to 19 years of marriage	85.6
After 20 or more years of marriage	31.1

431. The protection of the children during the union or in the event of the dissolution of the marriage is ensured by the provisions on the protection of the child, with regard to guardianship (see, in particular, articles 307 *et seq.* and 368 *et seq.* of the Civil Code, also currently being revised), or the temporary measures that the civil judge may impose if the spouses cease to live together (art. 176, para. 3, of the Civil Code), within the framework of a divorce procedure (art. 145 of the Code) or as the outcome thereof (arts. 156 and 315a of the Code).

432. In allocating parental authority and settling personal relationships after divorce, the judge is to take account, according to article 156 of the Civil Code (art. 138 of the pre-draft), of all circumstances that are important for the good of the child. Case-law indicates that this must be understood as the relationship between the parents and the child, the personal characteristics of the parents (educational capacity, physical or mental health, etc.), their living conditions (responsibilities, occupational situation, new relationship, etc.), as well as the personal characteristics of the child and the ties that siblings may have with each other.[278] The judge has broad powers of assessment that may be used to tailor decisions to particular cases. He will take account of any joint requests by the parents. The pre-draft also expressly envisages that the judge is to give the greatest possible weight to the child's views. This does not mean that the child will be asked whether he or she prefers to live with the father or mother but rather that, if a child who has reached a certain age expresses a clear opinion, the judge must give detailed grounds for any other decision. The pre-draft introduces the possibility of allocating joint parental authority to divorced parents. If a non-married couple separates, the child remains under the parental authority of the mother, as was the case during the union (art. 298 of the Civil Code).

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[277] On this amendment, see B. Dutoit/C. Sativa-Spring, "*La nationalité de la femme mariée*" (The nationality of the married woman), vol. I, supplement 1973-1989, Geneva, 1990, p. 209 *et seq.*

[278] ATF 115 II 317 *et seq.*

Article 24

433. The general principle of equality, as mentioned earlier in the chapter relating to article 2 of the Covenant, is clearly applicable to children. It will be useful to refer to the comments on minors in the chapters relating to article 8 (traffic in children and sexual exploitation of children by Swiss citizens abroad), article 10 (deprivation of liberty in the case of juveniles and deprivation of liberty for assistance purposes), article 14, paragraph 4, article 16 (conditions governing the enjoyment and exercise of civil rights), article 17 (protection of family life), article 18, paragraph 4, and article 23 of the Covenant.

434. It is also worth mentioning that the Swiss Government is on the point of ratifying the Convention on the Rights of the Child. A message on this subject has been submitted to the Federal Chambers. The ratification of that Convention, which gives a catalogue, though sometimes an inadequate and imprecise one, of the measures that States parties undertake to adopt with regard to the rights of the child, will make it possible to examine ways in which the legislation could be strengthened and better implemented to support all children. The following paragraphs define the minor child pursuant to Swiss law and give additional information on the rights and protection of children.

435. In Swiss civil law, a minor is a person who has not reached the age of 20 years. When a minor is not under parental authority, he or she is placed under guardianship (arts. 14 and 368 of the Civil Code). In some cases, civil majority may occur before the age of 20 years. After marriage (art. 14 of the Civil Code), a young man of 18 years of age or a young woman of 17 years of age is deemed to be of age (art. 96 of the Civil Code, see the comments above on art. 23). The supervisory authority may declare a young person to be of age when he is 18 years old (coming of age by emancipation, art. 15 of the Civil Code). A legislative amendment designed to change the age of civil majority to 18 years will probably become effective in 1995.

Paragraph 1

436. In the Swiss legal order, each person and, therefore, each minor child, enjoys civil rights and, consequently, equal status as regards rights and obligations, within the limits set by law (art. 11 of the Civil Code). However, only persons who are of age and capable of discernment exercise civil rights and may incur obligation through their own actions. The actions of persons lacking discernment generally have no legal effect (art. 18 of the Civil Code). Minors who are capable of discernment may incur obligation only with the consent of their legal representative (art. 19 of the Civil Code). However, they do not require such consent to acquire assets free of charge or to exercise strictly personal rights, such as their basic rights in the realm of ideas. These principles take account of the need to protect the minor child, while respecting the child's will, in so far as the child is capable of discernment.

437. The fundamental human rights, notably the principle of equality incorporated in article 4 of the Federal Constitution, are of general application and children therefore enjoy them without discrimination. The only exceptions are rights, such as political rights, for whose exercise an age limit is fixed. A minor who is capable of discernment may, in principle, enjoy fundamental rights in the realm of ideas. Article 48, paragraph 3, of the Constitution includes a specific rule in this connection: once a child has reached the age of 16 years, the parents cease to be empowered to decide on the child's religious education.[279] With this

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[279] See also the comments above on article 18 of the Covenant.

exception, the Federal Constitution contains no provision that specifically governs the rights of children and their relationship with their parents. None the less, under article 34 *quinquies* of the Constitution, the Confederation takes account of the needs of the family in the exercise of the powers conferred on it and within the limits of the Constitution (see the comments above on art. 23).

438. Titles 7 and 8 of the Civil Code deal with the establishment and effects of filiation. In particular, they govern the name and cantonal citizenship of the child, the duties of the parents and the children with regard to assistance and contacts of a reciprocal nature, as well as the right of the parents to maintain personal relationships with their child. The parents' duty of maintenance is also covered. The Civil Code places the minor child under the parental authority of the child's father and mother. There is no discrimination as regards succession between legitimate and natural children when a bond of filiation (either acknowledged or adjudicated) has been established with the father.

439. Pursuant to article 301 of the Civil Code, the father and mother decide on the care of the child, choose the child's education for the good of the child and take the necessary decisions, subject to the capability of the child. The child must obey his or her father and mother, who are to give the child the freedom to organize his or her life, in keeping with the child's degree of maturity, and taking account, as far as possible, of the child's views with regard to important matters. The parents must bring up the child according to their capability and means, encouraging the child's physical, intellectual and moral development. It is their duty to provide the child with general and occupational preparation of an appropriate kind, corresponding, as far as possible, to the child's preferences and aptitudes. To that end, they must cooperate with the school and, when circumstances require, with the public institutions to protect young people. The private relationships between parents and children are, furthermore, protected against unjustified interference by the State by the unwritten constitutional right to personal freedom, as well as article 8 of the European Convention on Human Rights and article 17 of the Covenant. The rules on parental authority therefore give the father and mother primary responsibility in the education of the children, while respecting the child's personal characteristics.

440. Although married parents exercise parental authority jointly (art. 297, para. 1, of the Civil Code), that is currently not the case after divorce or when the parents are not married to each other (art. 297, para. 3, and art. 298 of the Civil Code). Consequently, Swiss law does not allow for joint parental authority outside marriage. Parental authority belongs, in principle, to the mother if the couple are not married. If the mother is a minor, under legal disability or dead, or if parental authority has been removed from her, the supervisory authority appoints a guardian for the child or transfers parental authority to the father, whichever is in the best interests of the child. In the event of divorce, parental authority is allocated in the interests of the child. The current revision of the divorce law could allow, in future, for joint allocation of parental authority to divorced parents, as well as, under certain conditions, to unmarried partners.

441. One of the guiding principles of Swiss family law is, thus, the good of the child, and the action taken by the parents and the authorities must bear this in mind. Hence, under the title "Protection of the child", article 307 *et seq.* of the Civil Code lay down that the supervisory authority shall take the necessary measures to protect the child if the child's development is threatened and if the father and mother do not or cannot remedy the situation themselves. The measures that can be envisaged include, in particular, a reminder of the parents' duties, guidance or instructions about care, upbringing and education of the child, the nomination of a person empowered to give assistance and information, the appointment of a curator, withdrawal of custody or even parental authority, and placing the child under legal guardianship. In particularly serious cases, there is provision to send the child to a suitable establishment.[280] Naturally, these decisions are subject to recourse (art. 420 of the Civil Code).

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[280] Article 310 of the Civil Code.

442. The good of the child is also decisive in adoption procedures (art. 264 of the Civil Code), with reference to decisions on the allocation of parental authority to the father when the parents are not married (art. 298, para. 2, of the Civil Code) or if the visiting rights of one parent are withdrawn (art. 274 of the Civil Code). The concept of the good or the interest of the child must be put into practice by the competent authorities, depending on the needs of each individual case, and in the light of the general principles of constitutional and international law. In this regard, the Convention on the Rights of the Child, which Switzerland is about to ratify, will assist the authorities in matters of interpretation.

443. The international abduction of children is a matter of concern to the federal authorities. A central authority on the international abduction of children has been established in the Federal Justice Office. Each year it records 70 to 100 cases of abduction. The authorities assist the persons concerned in their endeavours to have children who have been illegally abducted abroad returned to Switzerland. Switzerland is a party to the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, dated 20 May 1980, and the Hague Convention on the Civil Aspects of International Child Abduction, dated 25 October 1980. However, the chances of effective intervention in cases of abductions to States that have not ratified these Conventions are slight.

444. Article 220 of the Penal Code, which has been in effect since 1 January 1990, provides for the punishment, if a complaint is made, by imprisonment or a fine, of a person who has abducted or refused to return a minor to the individual exercising parental authority or guardianship.

445. The maltreatment and exploitation of children by members of their family or by third parties is a serious problem, in Switzerland as elsewhere, as indicated by a recent report.[281] Alongside the protective provisions in the Civil Code, mentioned above, and those in the Penal Code regarding attacks on physical integrity, mention should be made here of articles 187, 188, 189, 190 and 213 of the Penal Code, which are designed to protect the sexual integrity of minors. The main problem, however, lies in the difficulty encountered by the competent authorities in uncovering cases of maltreatment in order to intervene in a timely manner. Such acts are generally committed in the inner family circle and the victims are reluctant to talk to outsiders. As indicated in the above-mentioned report, the public authorities and private organizations have already adopted many measures in this regard.[282] Further efforts need to be made (see the recommendations by the Working Group, on page 99 *et seq.* of the report). In this context, the new Federal Law on Assistance to Victims of Offences, dated 4 October 1991 (RS 312.5), is a step forward.[283] Finally articles 358 *bis* and 358 *ter* lay down an obligation of notification: "When, in the course of prosecuting for an offence committed against a minor, the competent authority finds that other measures are necessary, the authority shall immediately notify the supervisory authority"; "When the interest of the minor is at stake, persons covered by professional confidentiality or the confidentiality of their office (arts. 320 and 321) may advise the supervisory authority of any offences committed against minors".

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[281] Working Group on Maltreated Children, "*Enfance maltraitée en Suisse*" (Maltreated children in Switzerland), final report submitted to the Head of the Federal Department of the Interior, Bern, June 1992. This detailed survey is annexed to the present report.

[282] The most important organizations in this field include the Pro Juventute foundation and the Pro Familia Federation.

[283] The main objectives of this law are described in the core document forming the general part of this report (HRI/CORE/1/Add.29).

446. No criminal punishment may be imposed on children under the age of seven years. Up to the age of 18 years, minors are subject to a special criminal regime that makes use of education or assistance (arts. 82 to 99 of the Civil Code). In principle, 18 years is the age of criminal majority. However, article 64 of the Penal Code lays down that, if the perpetrator is aged between 18 and 20 years, that circumstance may be an extenuating factor. Furthermore, young adults (between the ages of 18 and 25 years) may be placed in a labour training establishment rather than an establishment for serving an ordinary criminal punishment (arts. 100 *bis* and 100 *ter* of the Penal Code).[284]

447. Swiss labour legislation[285] sets the minimum age for the employment of minors at 15 years. There are some exceptions to this in respect of certain types of light work that a child may do from the age of 13 years, provided that the child's development is not jeopardized. There are special rules for young workers aged between 15 and 19 years with regard to working hours, overtime, holidays, breaks and night or Sunday working. The Code of Obligations also governs the contractual obligations between employer and employee. An example is article 329a of the Code, which lays down five weeks' holiday for workers up to the age of 20 years, and article 329e of the Code on leave to participate in extra-curricular youth activities for young persons under 30 years of age.

Paragraph 2

448. The registration of each child and the child's right to a surname, a forename and cantonal citizenship are set out in articles 270, 271 and 301, paragraph 3, of the Civil Code, as well as in article 59 of the Order on Civil Status of 1 June 1953 (RS 211.112.1). This means that each newborn baby receives one or more forenames, its father's surname and cantonal citizenship. The communal and cantonal offices dealing with civil status, which are competent to act in this area, maintain the necessary official registers.

Paragraph 3

449. The Federal Law on the Acquisition and Loss of Swiss Nationality, dated 29 September 1952 (RS 141.0), envisages two ways of acquiring nationality: acquisition by operation of the law, particularly by filiation, and naturalization. The naturalization of foreign nationals or stateless individuals depends on certain conditions of integration in the national community and length of residence in Switzerland (12 years or five years in certain cases, art. 15 of the Law). However, there is no right to naturalization, even for stateless individuals, which is, in the case of children who can obtain no nationality other than Swiss nationality, perhaps not fully compatible with the requirements of article 24, paragraph 3. However, a child of unknown filiation found in Switzerland acquires the citizenship of the canton on whose territory the child was found and, thus, Swiss nationality (art. 6 of the Law).

450. A revision of the Federal Constitution with regard to acquisition and loss of Swiss nationality was rejected by the people and the cantons on 12 June 1994. It had been designed, in particular, to enable foreigners who had spent their childhood in the country to avail themselves of facilitated naturalization, thereby reducing the time ordinarily required for that procedure.

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[284] For more details see the comments above on article 10 of the Covenant.

[285] In particular, the Federal Law of 13 March 1964 on Work in Industry, the Craft Sector and Commerce (RS 822.11) and the Federal Law of 20 March 1981 on Work at Home (RS 822.31).

Article 25

1. Right to take part in the conduct of public affairs, to vote and to be elected

(a) The right to vote and to take part in the conduct of public affairs

451. At the federal level, the right to vote is guaranteed by articles 43, paragraphs 1 and 2, and 74, paragraphs 1, 2 and 3, of the Constitution, in the following terms:

> Article 43
>
> "1. Any citizen of a canton is a Swiss citizen.
>
> 2. In this capacity, he may take part at his place of domicile in all federal elections and votes, after having duly proved that he is qualified to vote."
>
> Article 74
>
> "1. Swiss men and women have the same rights and duties in respect of federal elections and votes.
>
> 2. All Swiss men and women aged 20 years and over who have not been deprived of their political rights through the legislation of the Confederation or the canton where they are domiciled have the right to take part in these elections and votes.
>
> 3. The Confederation may enact uniform legislative provisions on the right to take part in federal elections and votes."

These provisions are codified in the Federal Act on Political Rights of 17 December 1976 (RS 161.1), the Federal Act on the Political Rights of Swiss Citizens Abroad of 19 December 1975 (RS 161.5) and their implementing regulations.

452. The Swiss political system may be described as a "semi-direct democracy", which is a term intended to express the fact that the legislation adopted as a result of parliamentary debates is not final, the right of popular referendum having been recognized by the Constitution since 1874. Thus, if within 90 days of the adoption of a law by the Federal Chambers, 50,000 valid signatures are collected from voters wishing the new provisions to be subject to approval by the people, these provisions have to be voted on by the people and cannot enter into force unless a majority of citizens who have taken part in the voting so decide. The same happens at the request of eight cantons (art. 89, paras. 2 and 4, of the Constitution). Consequently, a law enters into force only after the 90-day referendum period at the earliest. In addition to laws, urgent decrees of constitutional scope and federal decrees of general application, the referendum rule also applies without exception to international treaties which are not subject to denunciation and are concluded for an unspecified period of time, as well as those which provide for membership of an international organization or entail the multilateral unification of the law (art. 89, para. 3, of the Constitution). Constitutional amendments, urgent decrees derogating from the Constitution and membership of collective security organizations or supranational communities are subject in all cases to the dual consent of the people and the cantons (compulsory referendum, arts. 89, para. 5, and 123 of the Constitution).

453. Since 1891, the Constitution has also recognized the right of popular initiative to propose the full or partial revision of the Constitution (art. 121 of the Constitution). For this purpose, 100,000 citizens' signatures must be collected within a period of 18 months. The Parliament cannot object to the submission of a popular initiative to the vote, except to declare it inadmissible as a result of a procedural defect or — according to the prevailing opinion — null and void as a result of a mandatory rule of international law (*jus cogens*; something that has never yet happened). Since initiatives can relate only to constitutional amendments, they must have the dual consent of the people and the cantons to be adopted.

454. The first paragraph of article 74 establishes the general principle of universal suffrage, which is applicable to the election of members of the National Council (People's Chamber),[286] to other federal votes, and to the rights of initiative and referendum. The election of representatives of each canton to the Council of States (Chamber of Cantons) is not governed by federal law but by the cantonal constitutions, and proceeds in all the cantons on the basis of universal suffrage. The Federal Council, in turn, is elected by the two Chambers combined as the Parliamentary Assembly.[287]

455. The equality of political rights is a prerogative whose violation may be appealed against (arts. 77 to 80 of the Federal Act concerning Political Rights). Neither the Constitution nor federal legislation prescribe specific duties in this regard. The cantons are free to do so, however, and to make it compulsory to assist in the counting of votes, even at federal elections.[288]

456. Paragraph 2 of article 74 deals with the conditions to be fulfilled in order to exercise the right to vote. These are three in number:

(a) **Swiss nationality**. This condition has the effect of excluding aliens resident in Switzerland from the right to vote. Since it applies only to political rights at the federal level, it does not prevent the cantons from involving aliens in political decisions at the level of the canton or commune.[289]

(b) **Age of civic majority**. This is established as 18 years (the age of majority under civil law still being 20 years). The cantons prescribe the same age limit.

(c) **Civic capacity**. This is governed by article 2 of the Federal Act concerning Political Rights, under which citizens deprived of legal capacity under article 369 of the Civil Code for reasons of mental illness or feeble-mindedness are deprived of the right to vote at the federal level. Thus, deprivation of civic rights presupposes the declaration of legal incapacity or, in other words, imposition of a guardianship order founded on one of the two causes exhaustively described in article 369 of the Civil Code.[290]

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[286] For the purposes of election to the National Council, each canton has a number of seats proportionate to the number of citizens resident in the canton. The election process is based on the principle of proportional representation. See the core document forming the general part of this report (HRI/CORE/1/Add.29), sect. II.B.3, "Organization of federal powers".

[287] See the core document forming the general part of this report (HRI/CORE/1/Add.29), sect. II.B.3, "Organization of federal powers".

[288] Nowadays, only the canton of Schaffhausen penalizes abstention, for which it imposes a fine of 3 francs.

[289] See comments below on this point.

[290] Thus, at the federal level, no other grounds are admitted for deprivation of civic rights (such as unsuccessful seizure, a criminal conviction, etc.). The cantons remain free, however, to invoke such grounds for deprivation of civic rights in the case of cantonal and communal elections.

457. At the cantonal level, citizens' political rights are more extensive than at the federal level since the government is directly elected by the people and many cantons also provide, in addition to constitutional initiative, which is possible in federal law only, for a right of legislative initiative allowing a specified number of citizens to submit a bill to the vote of the people. It should also be pointed out that each canton has its own constitution and laws. Legislative power in the cantons is generally exercised by a unicameral parliament elected on the basis of proportional representation. Some cantons, however, still operate a system of direct democracy whereby legislative power is exercised by assembly of the people. Executive and administrative power, on the other hand, is held by a "Council of State", elected by the people for a specified period and organized according to the same principles as the Federal Council: the President changes each year and collegiality is the rule.

458. Under paragraph 4 of article 74 of the Constitution, cantonal law is decisive with respect to cantonal and commune votes and elections. The cantons do not, however, have unlimited freedom in this regard but have to safeguard "the exercise of political rights in accordance with republican standards" (art. 6, para. 2, of the Constitution). The cantons are also required to ensure equality of treatment (art. 4 of the Constitution) and to uphold the rights of the people (art. 5 of the Constitution). They cannot, therefore, derogate from the principle of universal suffrage through unjustifiable discrimination against priests, defaulting tax-payers[291] or women.[292]

459. In general, the cantons establish Swiss nationality as a condition for the right to vote, while admitting a number of exceptions (see the comments below with regard to the political rights of aliens). The legal voting age is 18 years. The great majority of the cantonal constitutions, like federal law, provide for deprivation of civic rights only in the case of persons deprived of legal capacity on the grounds of mental illness or feeble-mindedness. Other grounds for civic incapacity are set forth, however, in individual constitutions (imposition of a guardianship order, culpable insolvency, persistent and culpable dependence on social welfare, detention in a penitentiary institution, etc.). Writers seem to recognize such exclusions, although now outdated, as not being in conflict with the Federal Constitution.[293] There are only two cantons, however, that are still concerned, namely Schwyz and Saint Gallen.

(b) Right to be elected

460. At the federal level, under articles 75, 96 and 108 of the Constitution, there are three rules governing eligibility to the National Council (People's Chamber), the Federal Council and the Federal Tribunal, corresponding to those already described with respect to the right to vote and the rights of initiative and referendum (Swiss nationality, civic majority and non-deprivation of legal capacity). In addition to these, however, there is a further, special rule — that of incompatibility with an ecclesiastical function, eligibility being confined to the laity under the Constitution.[294] This rule, which has its roots in the religious wars of the country's history and has been criticized in the literature, no longer serves any theoretical or practical purpose. The Roman Catholic Church prohibits its ministers in any case from exercising political functions.

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[291] ATF 41 I 58.

[292] ATF 116 Ia 359, referred to above in relation to article 3.

[293] E. Grisel, "*Commentaire de l'article 74 de la Constitution*" (Commentary on article 74 of the Constitution), in *Commentaire de la Constitution fédérale de la Confédération suisse*, Basel, Zurich, Bern, vol. III, No. 45, 1988.

[294] Despite the letter of article 75 of the Constitution, the issue at stake is that of conflict of duties rather than a condition of eligibility, so that a member of the clergy may legitimately be elected provided he does not perform his religious function (see article 18 of the Federal Act concerning Political Rights). For the other conflicts of functions at the federal level, see below.

461. At the cantonal level, the constitutions' authors have to respect the same principles as apply to the right to vote when enacting eligibility rules applicable to members of their executive, legislative and judicial bodies (arts. 4, 6, 43 and 60 of the Constitution; see above, para. 312). In the election of cantonal representatives to the Council of States (Chamber of Cantons), for instance, the cantons are free to limit such eligibility to their inhabitants, but not to their registered citizens.

462. In addition to the above-mentioned eligibility rules, the Federal Constitution and cantonal judicial systems lay down provisions establishing a number of incompatibilities between the exercise of a public function and other activities. These are usually aimed at safeguarding the separation of executive, legislative and judicial powers, as well as the bicameral system.

463. At the federal level, the following rules concerning conflict of duty can be identified. Articles 97 and 108 of the Constitution prohibit members of the Federal Council and Federal Tribunal from engaging in other employment during their term of office. Under article 77 of the Constitution (amplified by article 18 of the Federal Act concerning Political Rights), the mandate of national counsellor (elected to the People's Chamber) is incompatible with that of States counsellor (elected to the Chamber of Cantons), federal counsellor (member of the federal collegiate executive) or public official appointed by a federal counsellor. The office of federal judge (art. 108 of the Constitution) and also the bearing of decorations awarded by a foreign State (art. 12 of the Constitution) or, as noted above, being a member of the clergy (art. 75 of the Constitution) are also viewed as incompatible with that office. Under cantonal law, cantonal functions are also sometimes declared incompatible with that of national counsellor.[295] The action taken in cases of incompatibility consists in compelling the person concerned to choose between the duties in question. Incompatibilities relating to the office of States counsellor are identical to those applicable to the national counsellors, with two exceptions: where federal law provides no guidance, the cantons have discretion to decide on the incompatibility of the functions of member of the clergy and federal public official (art. 81 of the Constitution).

464. It is undoubtedly beyond the remit of this present report to undertake a detailed study of the incompatibilities established by the various cantonal constitutions and laws. Generally speaking, however, they correspond to the rules described below.[296]

(c) Conduct of elections

465. In order to guarantee the free expression of the will of the electors, article 25 (b) of the Covenant prescribes the holding of genuine periodic elections by universal and equal suffrage and by secret ballot.

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[295] In general, the cantons prohibit members of their executive from being national counsellors at the same time, or else allow only a limited number to fulfil both functions. Only five cantons, and smaller ones at that, do not impose this restriction. Some cantons have similar rules for higher-ranking judges, the Jura and Ticino going as far as to extend the restriction to all judges and cantonal deputies. Public officials at the cantonal level may not normally also be members of the Federal Assembly unless authorized by the cantonal government.

[296] For a comparative study of the systems applied by the cantons of Vaud, Valais, the Jura, Geneva, Neuchâtel, Fribourg and Bern, see Buffat, Malek, "*Les incompatibilités*" (The incompatibilities), *thèse* Lausanne, 1987.

466. Communal, cantonal and federal votes and elections in Switzerland fulfil these criteria. The general part of this report (HRI/CORE/1/Add.29, sect. II.B, "Government structure: federalism") outlines the procedures for electing the political authorities and may usefully be referred to. It might be added that the terms of office are, by and large, four years, which meets the periodicity requirement, and that the laws on political rights ensure equal suffrage and also the genuine nature of elections.[297]

467. Only the secret ballot requirement could be in conflict with article 25 (b) in so far as this requirement applies to regional and local elections. Traditionally, in some cantons, elections to the parliament and government, and of cantonal judges and even lower-ranking judicial officials, take place by show of hands, as does any vote on a cantonal issue, in the context of citizens' assemblies known as "*Landsgemeinde*". In other cantons, such as that of Graubünden, there exist "*Landsgemeinde*" of communes or circles ("*Kreise*") which, under the local constitutions, elect their officers by show of hands.

468. Although these institutions do not guarantee secrecy of voting and are not, therefore, in conformity with the Covenant's requirements on this point, their abolition would be difficult for historical reasons. This is why Switzerland entered the following reservation to article 25 (b): "The present provision shall be applied without prejudice to the cantonal and communal laws, which provide for or permit elections within assemblies to be held by a means other than secret ballot".

469. To the extent that article 25 (b) applies to elections rather than other "consultations" (popular votes), which normally take place in these cantons by show of hands, it was not felt necessary to extend the aforementioned reservation to the latter type of vote.

2. Right of access, on general terms of equality, to public service

470. With regard to access to public service in the broad sense, the Federal Act of 30 June 1927 containing the Regulations on Federal Public Officials (RS 172.221.10, henceforth "StF") provides that "Any Swiss national of good morals may be appointed to federal public office. A person deprived of legal capacity or pronounced incapable of serving in public office may not be appointed as long as the measure taken in regard to the person continues to have effect. With the consent of the Federal Council, a person not of Swiss nationality may in exceptional cases be permitted to enter public office" (art. 2 of the StF).

471. Broadly speaking, public officials are appointed on a competitive basis (art. 3 of the StF). Their appointment may be subject to the fulfilment of various requirements, such as age, ability, suitable educational qualifications, or even the possession of a rank in the Swiss army; it may also depend on the result of an examination or training course (art. 4 of the StF). Article 4, paragraph 2, of the Constitution implies equality for men and women with respect to access to public service.[298] It should be mentioned that public service may entail restrictions in the exercise of certain freedoms, notably freedom of association (see the comments above on article 22 of the Covenant).

3. Political rights of aliens in Switzerland

472. Although the rights guaranteed in article 25 are confined to citizens, the following paragraphs provide a summary of the current situation regarding the introduction of political rights for aliens at the local level.

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[297] By way of illustration, see the Federal Act concerning Political Rights of 17 December 1976 and its implementing regulations, annexed.

[298] See also the comments above on article 3 of the Covenant.

473. At the present time, only the cantons of Neuchâtel (at the communal level) and the Jura (at both communal and cantonal levels) accord aliens the right to vote. It should be pointed out that, in the former of these two cantons, an initiative to accord settled aliens the right to be elected to communal entities was rejected in 1992. Initiatives to introduce political rights for settled aliens have been documented in the nine cantons which, together, account for over half of the Swiss population. In every case where such an initiative has already led to a ballot, it has been rejected.

474. The commune of Lausanne has a so-called "immigrants" Consultative Chamber, this being an extra-parliamentary commission whose 42 members include 13 foreign representatives elected by direct universal suffrage by aliens domiciled in the commune, making it the only body of its kind in the country. The Consultative Communal Commission for Aliens, the permanent organ of the Chamber, is composed on a basis of parity of eight representatives of aliens and eight communal councillors, under the chairmanship of a member of the communal executive.

475. In addition, at the federal level (Federal Commission for Aliens' Problems), cantonal level (Geneva, the Jura and Neuchâtel) and communal level (in 20 or so communes), aliens may be appointed by the authorities to sit with representatives of the latter as members of official committees, which allows them to express their views on subjects of relevance to the social integration of aliens.

476. Aliens are entitled to vote on Swiss territory in their own national elections, subject to prior notification. Initially, this was only possible by correspondence, but this right may now be exercised through the diplomatic and consular missions of the countries of origin.

Article 26

477. The requirement of general equality of treatment is an aspect of the notion of the rule of law which has its roots in justice. It is thus a fundamental principle of the Swiss legal order, expressed in the following way in article 4 of the Federal Constitution:

> Article 4
>
> "All Swiss are equal before the law. In Switzerland there are no subjects nor any privileges of place, birth, person or family.
>
> Men and women have equal rights. The law provides for equality, in particular in the areas of the family, education and work. Men and women are entitled to equal pay for work of equal value."

478. The manner in which the principle of equality is regulated and applied in Swiss law has been dealt with above, chiefly in the chapters devoted to articles 2 and 3 of the Covenant (the latter concerning equality between men and women), but also in relation to each of the rights guaranteed by that instrument. The following observations will therefore focus on recalling specific basic principles already outlined above, referring to the reservation entered by Switzerland regarding article 26 of the Covenant and pointing out the problems encountered in practice with respect to universal enjoyment of the right to equality of treatment.

479. As its wording indicates, the main aim that article 4, paragraph 1, of the Constitution was originally designed to achieve was to ensure political equality for citizens, to place all the cantons on an equal footing and to eliminate privileges attached to place or birth. Legal equality, however, has long since acquired the status of a general principle governing the entire Swiss legal order. It applies both in the realm of legislation (equality in the law) and in that of the application of the law (equality before the law).

480. As a constitutional principle, equality implies first and foremost the prohibition of unjustified distinctions but also, to some extent, a mandate for the legislator to reduce social inequalities and improve the individual's opportunities for personal fulfilment. Thus, in various parts of the Constitution, the Confederation is given the task of improving equalities of opportunity. This is principally the case with regard to public education and training (art. 27, paras. 2 and 4, art. 27 *quater* and art. 34 *ter*, para. 1 (g), of the Constitution), social insurance (art. 34 *bis*, *quater*, *quinquies* and *novies* of the Constitution) or worker protection (art. 34 and art. 34 *ter* of the Constitution). Thus, although article 4 of the Constitution does not specifically list prohibited grounds for discrimination, unlike articles 2 and 26 of the Covenant, it is none the less universally applicable to all unjustified and hence discriminatory differences of treatment.

481. One of the main features of article 4 of the Swiss Constitution is the number and importance of the constitutional rights and principles that the case-law of the Federal Tribunal has derived from it. These jurisprudential rules are highly diverse (equality of treatment, the protection of good faith, prohibition of the denial of justice, of unjustified delay in giving a judgement, and of excessive formalism, the right to be heard and the right to free legal assistance, the principle of legality and proportionality, and the non-retroactivity of legal provisions); some of them have been examined earlier in this report, particularly in the chapter dealing with article 14 of the Covenant.

482. It should be stressed, lastly, that the right to equality is not confined to Swiss citizens, but extends to aliens also.[299] Equality is a universally applicable human right. The fact of being an alien may, however, constitute objective grounds for a difference in treatment where Swiss nationality plays a cardinal role in the matter to be regulated. This applies particularly to civic rights and obligations.

483. According to a recent practice of the Committee on Human Rights, instituted by its general comment No. 18 of 9 November 1989, article 26 of the Covenant is an autonomous right of independent scope whose application is not confined to those rights guaranteed by the Covenant, but which prohibits all discrimination in law or fact in every sphere regulated and protected by the public authorities. Unlike article 14 of the European Convention, where the principle of non-discrimination has no independent scope, article 26, therefore, guarantees the principle of equality *per se*. In this sense, its scope of application corresponds to that of article 4 of the Federal Constitution, which is not entirely unproblematic, since article 113 of this same Constitution requires the Federal Tribunal to apply in every case the general federal laws and decisions adopted by the Federal Assembly, as well as international treaties.[300] In other words, when such a legal text contains a provision implying discriminatory inequality of treatment, the Federal Tribunal is not empowered to order measures to remedy the failure to comply with article 4 of the Constitution, this role devolving to the legislature. However, while these inequalities are in the process of being totally eliminated in the field of civil and political rights,[301] this is not yet the case in other areas of law, where discriminatory aspects of federal legislation continue to exist, mainly to the disadvantage of women (legislation pertaining to social insurance being the main case in point).

484. In view of this situation and in order not to create different levels of protection in two international human rights instruments covering similar ground, the Covenant and the European Convention on Human

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[299] ATF 93 I 1.

[300] In this regard, see the core document constituting the first part of this report (HRI/CORE/1/Add.29), in particular p. 13, para. 53.

[301] On those inequalities which persist and the legislative work being done to eliminate them, see in particular the comments above on article 3 of the Covenant.

Rights, the Swiss authorities entered a reservation to article 26 to the effect that "the equality of all persons before the law and their entitlement without any discrimination to the equal protection of the law shall be guaranteed only in connection with other rights contained in the present Covenant".

485. Notwithstanding the adoption in 1981 of the second paragraph of article 4 of the Constitution on equality between men and women and the progress achieved since that time both in legislation and in practice, it is in this field that de facto inequalities exist with discriminatory consequences. Where these are associated with civil and political rights, they are described in the chapter on article 3 of the Covenant. As regards the exercise of social, economic and cultural rights, the relevant initial report by Switzerland regarding the relevant covenant will explore the situation and describe the efforts being undertaken to rectify inequalities in those areas.[302]

Article 27

486. Switzerland is often described as the "country of minorities", and it is quite true that there are virtually no Swiss citizens who do not belong in some way to both a majority and a minority. Thus, for example, a German-speaking inhabitant of Valais will speak a majority language from the point of view of the Confederation, but a minority one in his canton. This example highlights the fact that minorities exist at the level of the cantons, or even the districts or communes, and not only at the federal level.

487. The diversity of linguistic and religious minorities in Switzerland has historical roots.[303] It has been written that Swiss identity is not national or cultural, but political.[304] And, indeed, it is shared political beliefs and ideals, such as federalism, the rule of law and democracy, that, more than linguistic or cultural unity, form the cement of federal unity. Moreover, the federal State is made up of entities — the cantons — which pre-dated it. This overlapping of administrative, linguistic and cultural borders works against a single group's achieving dominance, even a group with a strong majority such as the German-speaking Swiss. Also, by fostering mutual understanding and respect amongst individuals within the federal State, through respect for territorial integrity and national unity, Swiss federalism contributes in a unique and important way to respect for minority rights.[305]

Ethnic minorities

488. Switzerland does not have ethnic minorities in the strict sense. The only group that might come into this category from the point of view of article 27 of the Covenant is that of nomads or "people of the road". No detailed breakdown has been made of the nomadic population living in Switzerland, but according to estimates it is evaluated at around 25,000 persons, of whom only 4,000-5,000 have not become sedentary.[306] The great majority of nomads in Switzerland regard themselves as being of "*jennische*" stock. In an appeal sent to the Federal Council on 23 November 1993, they demanded official recognition for their people, special sites to accommodate them adapted to their particular needs and the conclusion of an intercantonal agreement allowing them to pursue their activities beyond cantonal borders (itinerant tradesmen's licences are issued by each canton individually and are valid for the territory of the issuing canton only).

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[302] See the message of the Federal Council concerning the federal law on equality between women and men of 24 February 1983, annexed.

[303] For the historical background and a breakdown of the population by language and religion, see the core document forming the first part of this report (HRI/CORE/1/Add.29) and the comments below.

[304] T. Fleiner, "*Die Stellung der Minderheiten im schweizerischen Staatsrecht*" (The status of minorities in Swiss law of nationality and citizenship), *in* FS Werner Kägi, Schulthess, Zurich, 1979, p. 115 *et seq.*

[305] For a profile of Swiss federalism from the point of view of the protection of minorities, see the report submitted by Professor G. Malinverni of Geneva University to the European Commission for Democracy through Law, document CDL (91) 21 of 8 October 1991, annexed.

489. While it is true that, as elsewhere in Europe, nomads living in Switzerland have suffered harassment and even persecution,[307] their relations with the authorities in recent years have developed in the direction of greater mutual understanding and cooperation. One recent turning-point in this general trend took place in 1972, the year when the aid organization "Children of the Road", founded in 1926 by the "Pro Juventute" foundation with the aim of protecting the children of nomads, was dissolved. It was the abuses committed in the name of this protection (enforced settlement of children, separation of 619 children from their families)[308] that led to the dissolution of this organization. The Pro Juventute foundation, moreover, has officially apologized to the nomad community and has set about compensating the victims, a total amount of SF 11 million having been divided among almost 1,900 victims.

490. Generally speaking, the nomads living in Switzerland have Swiss nationality and enjoy, without discrimination, all the rights guaranteed by the Constitution, domestic law and the relevant international treaties. In particular, they have the right to have their own cultural life and to speak their own language. It cannot be denied, however, that the fact that their way of life is not geared to the public infrastructure (schools; cantonal labour regulations; social insurance; specially adapted sites; access to communal public facilities, etc.) makes it difficult for them to exercise some of their rights, especially those of a social, economic or cultural nature. In its 1983 report entitled "*Les nomades en Suisse*" (Nomads in Switzerland) (annexed), the Research Commission set up by the Federal Department of Justice and Police investigates this situation, which is falls chiefly within the scope of competence of the communes, and the associated problems, and comes up with a set of proposals for action to improve matters.

Linguistic minorities

491. Switzerland has four national languages: German, which is spoken by 63.6 per cent of the population; French (19.2 per cent); Italian (7.6 per cent); and Rhaeto-Romansch (0.6 per cent). The first three are the official languages of the country. About 8.9 per cent of the population has a different mother tongue from these four. The fact that there are three officially recognized languages means that everyone, including people belonging to the linguistic minorities, has the right to communicate with the federal authorities in his or her own language. All federal laws are published in the three official languages and the deliberations of the Federal Parliament may take place in these languages, although in actual practice only German and French are used since these are the only languages for which interpretation is normally provided. Furthermore, it should be noted that most important decisions and texts such as, for example, the Universal Declaration of Human Rights, are translated into Rhaeto-Romansch, despite its not being an official language.[309]

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[306] Source: "*Fahrende Menschen in der Schweiz*" (Travellers in Switzerland), Caritas Suisse, Dokumentation 1/88, 1988, p. 5. See also "*Les nomades en Suisse*", report of the Research Commission set up by the Federal Department of Justice and Police, Bern, June 1983, p. 17.

[307] For the historical background on this subject, see "*Fahrende Menschen in der Schweiz*", pp. 7-13.

[308] Figures taken from "*Hilfswerk Kinder der Landstrasse*" (The aid organization "Children of the Road"), Cantonal Working Group, report and proposal of 8 May 1987, p. 6.

492. Out of the 26 cantons and demi-cantons, 17 are German-speaking, four French-speaking, one Italian-speaking (with a small German-speaking minority) and four (Bern, Fribourg, Valais and Graubünden) have a national linguistic minority (or two in the case of Graubünden) within their territory. While the borders of the cantons generally correspond to linguistic borders, this is not an absolute rule. Swiss territory can none the less be easily divided into three stable and clearly defined regions. In the multilingual cantons, various approaches have been adopted to ensure the coexistence and equal rights of linguistic communities. In most of the cantons, the course followed has been to decentralize competences in the realms of education and cultural policy to the level of the districts or communes. Primary education, for example, is the responsibility of the communes, which are linguistically homogeneous, while the cantons are responsible for ensuring bilingualism at the secondary level, or even at the university level, as in the case of Fribourg. The same applies to the judicial system, which is decentralized to the level of the districts, the cantonal courts giving their rulings in the language used in first instance.[310] The Federal Tribunal, on the other hand, uses in civil and administrative proceedings the language of the canton in which the case was tried and, in criminal proceedings, the language of the accused, provided it is one of the official languages.

493. Freedom of language and the principle of the territoriality of languages, both of which are principles upheld by the Federal Tribunal in its decisions,[311] have been the focus of heated debate amongst legal experts with regard to their substance, scope of application and even their usefulness as separate and distinct constitutional principles.[312] The criticisms attracted by these principles are often prompted by judicial decisions linking freedom of language with the principle of territoriality in a manner prejudicial to linguistic minorities.[313] Other decisions have been adopted, however, which are more favourable to these minorities: the Federal Tribunal, for example, established as a borderline case the fact that judicial bilingualism had not been instituted when a linguistic minority attained a quarter share of the population of the entity concerned and that, in such circumstances, the imposition of a single language of instruction in the public schools would not be acceptable.[314]

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[309] Cf. F. Capotorti, "*Etude des droits des personnes appartenant aux minorités ethniques, religieuses et linguistiques*" (Study of the rights of persons belonging to ethnic, religious and linguistic minorities), Study Series No. 5, United Nations Centre for Human Rights, New York, 1991, p. 81.

[310] For greater detail, see T. Fleiner, "*Minderheitenschutz im Kantonalen Recht der Schweiz*" (Protection of minorities in Swiss cantonal law), in *Jahrbuch des Oeffentlichen Rechts, Neue Folge, Band 40*, 1991/1992, p. 45 *et seq.*

[311] ATF 91 I 480.

[312] For a recent study of the status of this issue and of constitutional work in this regard, see C.-A. Morand, "*Liberté de la langue et principe de territorialité. Variations sur un thème encore méconnu*" (Freedom of language and the principle of territoriality. Variations on a still poorly understood theme), in *Revue de droit suisse*, 1993, p. 11 *et seq.* The following paragraphs are largely based on this article.

[313] ATF 91 I 480.

[314] ATF 106 Ia 299; see also ZBl. 1982, p. 370.

494. Despite being disputed, the principle of the territoriality of languages may be inferred from article 116 of the Federal Constitution, according to which there are four national languages in Switzerland. This provision merely recognizes the situation which already exists, namely that the territory of Switzerland is divided into four linguistic zones of unequal size. The territoriality principle is designed to guarantee Switzerland's linguistic plurality and the homogeneity of the four linguistic regions by protecting the languages within their traditional area of use. It allows the Confederation to take the necessary measures to promote minority or threatened languages. The Federal Act concerning subsidies to the cantons of Graubünden and Ticino for the safeguarding of their culture and language is an example of such measures.[315]

495. Without claiming to resolve the complex problems presented by theoretical analysis of freedom of language with reference to Swiss law, we shall nevertheless attempt to draw a distinction, in this report, between the two different natures of this law.

496. Freedom of language applies first and foremost to interpersonal relations. It protects the individual against interference by the authorities in such relations. As such, it constitutes a genuine human right and, in the same way as other fundamental rights, it guarantees a right (that of speaking the language of one's choice) which may indeed be limited — in the sense that the public aspects of relations between individuals are subject to regulation — but only where three conditions are fulfilled, namely the existence of a legal basis, the presence of an overriding public interest and respect for the proportionality of the measure. Considered from this point of view, freedom of language is the entitlement of every individual, whatever language he uses.

497. As regards the individual's relations with the State, there exists no fundamental or individual right to communicate with the State authorities in the language of one's choice (except in relation to procedure; cf. articles 5 and 6 of the European Convention on Human Rights, and articles 9 and 14 of the Covenant and the chapters of the present report concerning those articles). The fact that a canton or even commune might establish a particular language as an official language does not, therefore, constitute a limitation on an originally unlimited freedom.[316] However, the cantonal or communal authorities accord national linguistic minorities of a certain size the right to communicate with the authorities or to receive State education in their own language. As noted above, the Federal Tribunal establishes this as a minimum right of the individual, dependent on membership of a minority, and prescribes a specific course of action on the part of the State[317] (such as, for example, the introduction of bilingualism in education or judicial procedures). It is self-evident that the effort required of the public authorities concerned must be in reasonable relation with the end pursued: clearly, a small commune cannot be expected to organize education in a minority language, but it could provide the children with transportation to go to school in a neighbouring commune.[318]

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[315] G. Malinverni, "*Fédéralisme et protection des minorités en Suisse*", report submitted to the European Commission for Democracy through Law, Strasbourg (document CDL (91) 21 of 8 October 1993, annexed).

[316] C.-A. Morand, "*Liberté de la langue et principe de territorialité. Variations sur un thème encore méconnu*", p. 28.

[317] ATF 106 Ia 299.

[318] C.-A. Morand, "*Liberté de la langue et principe de territorialité. Variations sur un thème encore méconnu*", p. 30.

498. With regard to the representation of linguistic minorities in political organs at the federal level, reference should be made to the description of the federal system given in the core document forming the first part of this report (HRI/CORE/1/Add.29), and to the report submitted by Professor G. Malinverni of Geneva University to the European Commission for Democracy through Law (document CDL (91) 21 of 8 October 1991, annexed).

Religious minorities

499. With regard to religious denominations, the resident population is 44.3 per cent Protestant, 47.6 per cent Roman Catholic, 0.3 per cent Old Catholic, 0.9 per cent Muslim, 0.6 per cent Orthodox and 0.3 per cent Jewish, while 3.8 per cent is composed of persons of no religious denomination. There are also some other religions (Mormons, Scientologists, etc.) for which there are no individual statistics and which, taken together, make up about 0.3 per cent of the population.

500. Relations between the Catholic and reformed religions have long been Switzerland's main problem with regard to minorities, the most conspicuous example of this being the "*Sonderbund*" civil war, a religious conflict which to all intents and purposes led to the dissolution of the former alliance of cantons.[319] Today, interdenominational relations are no longer such a problem, even though many of the cantons have to take account of large religious minorities. Whether these minorities are large or small, their members enjoy complete constitutional freedom of conscience and belief (arts. 49 and 50 and art. 2, para. 3, of the Constitution), as described above in the chapter on article 18 of the Covenant, and may, subject to the general public order proviso, practise their religion in complete freedom.

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[319] See the core document forming the first part of this report (HRI/CORE/1/Add.29). It will be recalled that the reason why the canton of Appenzell was divided into two demi-cantons following the Counter-Reformation was to allow the two religious communities to exist separately.